JD–37–05
Tonawanda, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

M.J. MECHANICAL SERVICES, INC.

and Case 3–CA–23680

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 71, AFL-CIO

M.J. MECHANICAL SERVICES, INC. d/b/a
VASTOLA HEATING & AIR CONDITIONING

and Case 3–CA–23697

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 71, AFL-CIO

M.J. MECHANICAL SERVICES, INC.

and Case 3–CA–24062

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
AND ITS LOCALS 46 AND 71

Aaron B. Sukert, Esq., for the General Counsel.
Thomas S. Gill, Esq., for the Respondent.
Arlus J. Stephens, Esq., for the Charging Party Unions.

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Buffalo, New York, on June 21-23, 2004. On August 30, 2002, an order consolidating cases, consolidated complaint and notice of hearing issued in Cases 3-CA-23680 and 3-CA-23697, based on charges filed by Sheet Metal Workers' International Association, Local Union No. 71, AFL-CIO (Local 71) alleging that M.J. Mechanical, Inc. and M.J. Mechanical Services, Inc. d/b/a Vastola Heating & Air Conditioning (MJ or Respondent) has engaged, and is engaging, in certain unfair labor practices. On October 24, 2003, the Regional Director issued an order consolidating Case 3-CA-24062 with the two above-referenced cases, and amending the consolidated complaint based on additional charges filed by Local 71,[1] as well as Sheet Metal Workers' International Association, Local Union No. 46 (Local 46).[2]

[1] The General Counsel further amended the amended complaint at trial by asserting that Employee Christine Nowak is an agent within the meaning of Section 2(13) of the Act. (Tr. 8.)

[2] Local 71 and Local 46 are collectively referred to as the "Union."

The amended consolidated complaint alleges that since August 15, 2000, the Respondent has refused to consider union member applicants for employment. It specifically alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by (1) adopting and thereafter continuously maintaining a new hiring policy in order to exclude from consideration job applicants on the basis of their union affiliation; (2) refusing to distribute employment applications to job applicants in order to exclude from consideration for employment job applicants based on their union affiliation; and (3) refusing to accept resumes and/or employment applications by mail. The amended complaint alleges that the Respondent engaged in this conduct in order to give hiring preferences to employee-applicants who do not engage in union and protected concerted activities and in order to discourage employee applicants from engaging in these activities.

The Respondent's timely amended answer denied the material allegations of the amended consolidated complaint, admitted certain allegations, and asserted affirmative defenses. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party Unions, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is a contractor specializing in heating, ventilation, refrigeration and air conditioning installation, service, and maintenance, as well as sheet metal installation with an office and place of business located in Tonawanda, New York. In the 12-month period prior to the filing of the complaint, the Respondent performed services in excess of $50,000 in states other than the State of New York.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Past Unlawful Conduct*

1. MJ Mechanical I

For over 10 years, the Respondent, a nonunion contractor, has been engaged in litigation before the Board and the courts concerning its hiring policies. In *M.J. Mechanical Services* (*MJ Mechanical I),* 324 NLRB 812 (1997), the Board found, among other things, that the Respondent violated Section 8(a)(3) of the Act by discharging two employees after they announced that they were union organizers, by refusing to hire qualified job applicants because

of their union affiliation, by issuing written warnings to employees for engaging in union activities, and by imposing a significant travel requirement on union-affiliated job applicants.[3] The Federal Court of Appeals enforced the Board's order in full. *M.J. Mechanical Services v. NLRB,* 172 F.3d 920 (D.C. Cir. 1998).[4] The pertinent facts of that case, which have some bearing on aspects of the present case, are as follows.

In spring 1994, the Respondent, which is headquartered outside of Buffalo, New York, obtained a contract to work on a building for Bausch & Lomb in Rochester, New York. Sheet Metal Workers Local Union 46 contacted the Respondent about providing union members to work on the project: however, the Respondent advised the Union that it was not interested in any work arrangement.

Thereafter, two union members, Paul Colon and Steven Derleth, obtained the Union's permission to apply to work for the Respondent, a nonunion contractor, and applied for a job. In the course of their interviews, they were questioned about their loyalties and allegiance to the Union. After starting work, Colon and Derleth told their immediate supervisor that they were on the job to organize the Respondent's employees. Upon learning that Colon and Derleth wanted to organize the workers, the job foreman threatened to terminate them if he heard them or anyone else "talking union." Eventually, he did terminate them.[5]

Ten days later, on June 13, 1994, eight union members entered MJ's trailer at a jobsite in Rochester and gave the foreman their completed job applications which were on application forms prepared by the Union. Although the Respondent had no immediate job openings for all eight union applicants, the foreman accepted the job applications, and subsequently contacted all of the union job applicants to schedule a job interview at the Respondent's main office in Tonawanda, New York. Only two applicants, Mark Roberge and Dean Weiss, went to Tonawanda for an interview, which was attended by the Respondent's President Michael Poole. The evidence showed that Poole ordinarily did not participate in personnel interviews, but decided to do so for these applicants because of the "Union situation." In the course of the interview, Poole asked the union applicants if they would stop working for the Respondent if the union organizing effort did not succeed.

Neither Roberge or Weiss was contacted again or offered a job, even though the Respondent conceded that they were qualified for the jobs for which they applied, and even though at least seven nonunion applicants were hired after Roberge and Weiss were interviewed. The Board therefore found that the Respondent violated the Act by refusing to hire the union job applicants and by requiring them to travel to Tonawanda for an interview, which no other applicants were required to do.

In July 1994, Union Member Christopher Diak covertly applied for a job with the Respondent through an employment agency. He did not list his union background on his application and when questioned about a union affiliation during his interview with the job

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[3] The Board also found that the Respondent violated Section 8(a)(1) by interrogating job applicants about their union affiliations, by threatening to discharge an employee for engaging in union activities, and by promulgating an overly broad no-solicitation rule prohibiting employees from engaging in union solicitation during their breaktimes.

[4] 1998 WL 939528

[5] Colon and Derleth were reinstated, but were warned not to engage in union activity during break or on company time. A week later, the Respondent gave them written disciplinary warnings for soliciting employees on "company" time, which the Board found violated Section 8(a)(3).

foreman he denied he was a union member. He was hired, but when the Respondent found out that he was a "salt" and that he falsified his application, he was fired. The Board found that the Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully interrogating him during the job interview and by unlawfully discharging him.

2. MJ Mechanical II

In *M.J. Mechanical Services, Inc. (MJ Mechanical II),* 325 NLRB 1098 (1998), the Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(3) of the Act by failing and refusing to consider for hire applicants because of their union affiliation. In doing so, the Board concurred with the judge's conclusion that union animus was a motivating factor for MJ's unlawful conduct.[6] It also adopted his finding that the Respondent violated Section 8(a)(1) of the Act by establishing policies by which it would no longer distribute job applications from its Rochester, New York office, and by which it would no longer provide applicants with copies of their applications. On appeal, the Federal Court of Appeals enforced the Board's order in full stating, in relevant part, "[s]ubstantial evidence also supports the Board's finding that M.J. Mechanical instituted policies of not providing copies of completed employment applications and not distributing blank applications in Rochester in order to make it more difficult for Local 46 members to apply for work." *M.J. Mechanical Services v. NLRB,* 194 F.3d 174 (D.C. Cir. 1999).[7] The pertinent facts of the adminstrative law judge's decision are as follows.

On several occasions throughout 1995, Union members had filed employment applications with the Respondent, but unlike the union applicants in *MJ Mechanical I,* these Union applicants were never contacted again by the Respondent or granted an interview. Specifically, in April 1995, Union Organizer Chris Hollfelder and three union members went to the Respondent's Rochester, New York office, where they told the receptionist that they were from the Union and filed employment applications made from copies of an original employment application that Hollfelder had obtained from the Respondent's Tonawanda, New York office. The Respondent's service operations manager told the group that the applications were good for a year or two and forwarded the applications to the Respondent's headquarters in Tonawanda, New York. In Tonawanda, the applications were placed on a general manager's office chair and eventually were discarded without being read.

On April 18, Hollfelder submitted the completed employment applications of four unemployed journeymen union members at the Respondent's Tonawanda office. On May 2, three more union members submitted employment applications at the Respondent's Rochester office. On September 19, Hollfelder submitted an employment application for himself and 11 apprentices at the Tonawanda office. None of these union applicants was contacted or granted an interview by the Respondent.

Notably, sometime between May 2 and September 19, 1995, a meeting of high management officials and office staff was held at the Respondent's Tonawanda headquarters at which time the Respondent's counsel, Thomas Gill, Esquire, instructed the office staff not to hand out any more job applications at Rochester where the Union was attempting to organize and to direct all job applicants to contact the Tonawanda office. The office staff was also directed to stop each applicant with a photocopy of his completed application.

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[6] The judge also found that the Respondent's hiring practices were inherently destructive of the applicants' Section 7 rights, but the Board found it unnecessary to rule on this finding.

[7] 1999 WL 334521

In the meantime, between May and November 1995, the Respondent hired several individuals to work as sheet metal installers or fabricators. The Respondent hired several of these individuals without checking with prior employers. Many were hired without prior sheet metal experience at the request of an MJ employee. Many others were hired through temporary employment agencies, even though they had no prior experience in the sheet metal industry.

On these facts, the Board and the D.C. Circuit Court of Appeals held that M.J. Mechanical violated Section 8(a)(3) and (1) of the Act by refusing to consider union applicants because of their union affiliation and made it more difficult for union members to apply for work by not providing copies of completed employment applications and not distributing blank applications in Rochester, New York (where it was hiring at the time).

3. MJ Mechanical III

On February 29, 2000, the General Counsel issued a compliance specification for all of the violations found in both *MJ Mechanical I and II..* The Respondent challenged the compliance specifications. On June 20, 2000, the matter was heard by an administrative law judge, and on September 18, 2000, a decision was issued. Exceptions to the decision were filed, which are pending before the Board. *Mechanical Services,* 2000 WL 33665497 (September 2000).

B. *The Respondent's Evolving Hiring Policy*

Since at least 1993, the Respondent has encouraged its employees to recommend applicants they knew for employment. The policy was stated in an early version of the MJ Mechanical Services, Inc., "Personnel Policies, Practices and Procedures Manual" (September 1993), to wit:

> "How To Recommend A Potential Employee"
>
> At MJ Mechanical Services, we encourage employees to recommend people for possible employment. Because our employees are so familiar with our company and its needs, we know your recommendations will often be on target.
> (GC Exh. 1, p. 1.)

While employee referrals were encouraged, it was not the Respondent's sole recruiting method. Indeed, when the salting campaign began in 1994, the Respondent interviewed several applicants with no referrals and even hired some of them. For example, Paul Colon and Steve Derleth, in *M.J. Mechanical I*, were walk-ins, who applied without a personal recommendation of any incumbent MJ employee or supervisor. Both were interviewed and hired after assuring the Respondent that they were disenchanted with the Union. (G.C. Exh. 3: 324 NLRB at 823.) Other union member applicants without referrals, responded to newspaper ads, were interviewed, but were not hired. (GC Exh. 3: 324 NLRB at 824.) Mark Golding, for example, responded to a newspaper ad that was placed in a local newspaper by a temporary employment agency retained by the Respondent. In addition, several walk-in union member applicants, none of whom were referred by any incumbent employee or supervisor, applied as a group, using applications on forms prepared by the Union, which the Respondent accepted and used as a basis for contacting them for interviews. (GC Exh. 3: 324 NLRB at 827.) Thus, the evidence shows that although the Respondent encouraged its employees to refer people they knew for jobs, it was not its sole source of job recruitment.

In 1995, as reflected in *MJ Mechanical II,* the Respondent handed out its own job applications to walk-in union members, who were not referred by anyone, and also accepted photocopies of its own job application from walk-in union members. None of these union applicants, however, was given an interview. (GC Exh. 4: 325 NLRB at 1102-1104.) Moreover, at some point between May and September 19, 1995, the Respondent stopped handing out its employment application and stopped making copies of the completed applications at the direction of its counsel, Thomas Gill, Esquire. (GC Exh. 4: 325 NLRB at 1102.) Thus, the Respondent's hiring policy was going through a gradual transition.

Coincident with these changes, the Respondent in *M.J. Mechanical II* tailored its hiring by selecting only individuals that were either referred by employees or supervisors or referred by temporary labor services companies contracted by the Respondent to fill job vacancies. With respect to the former, Judge Amchan found that in many instances in which the new hires were recommended to MJ, there was no indication that the individual recommending the applicant knew him in any context other than a social setting. (GC Exh. 4: 325 NLRB at 1105.) In addition, many of those individuals who came recommended had no prior sheet metal experience, e.g., Greg Hamilton, Don Olsen, David Warren, Richard Prisinzano, Dan Sprowell, Alvin Rhoda, and Wayne Thompson and the Respondent did not check their prior employer references. (GC Exh. 4: 325 NLRB at 1102–1103, 1105.) Thus, there was little or no correlation between the Respondent's hiring selections and the successful candidates' skills and abilities.

With respect to the latter group*,* the Respondent argued in *MJ Mechanical II,* that it was company policy to hire nonunion strangers only through temporary service agencies. Judge Amchan flatly rejected that argument finding that "there is no evidence that MJ had a policy of hiring nonreferrals only through a temporary services agency and not hiring individuals who applied for a job at its offices–at least not until the salts started applying for jobs. (GC Exh. 4: 325 NLRB at 1105.)

In 1996, as the Union continued to press its organizing efforts, the Respondent altered its hiring policy again by placing a sign in its lobby, which stated: "Currently Not Accepting Applications." The Respondent has never taken down the sign, even though it has continued hiring. The evidence shows for example that the Respondent continued to accept applications that were mailed in, faxed, e-mailed, and referred by various sources. (Tr. 287-292.) The sign was posted even when the Respondent solicited applications in 2001, by placing a series of advertisements in the local newspaper seeking to fill certain positions. In his testimony in the present case, the Respondent's President Michael Poole eventually conceded that the sign actually meant that MJ was not taking applications from walk-ins off the street.

The first time the Respondent described its hiring procedures in writing was in a letter, dated April 17, 1998, from Poole to Union Attorney Richard D. Furlong, Esquire, where he stated:

> MJ Mechanical Services, Inc. (MJ) is required by law not to discriminate on the basis of race, religion, sex, color, creed, national origin, legal out-of-work activity, bankruptcy, age, or protected concerted activity under the National Labor Relations Act. To ensure that we do not discriminate, we have adopted neutral hiring procedures and we want to tell you what they are.
>
> The following are MJ's hiring procedures:
>
> 1. MJ does not accept applications for work unless it has an actual job opening.

2. When MJ has the need for applications, it will remove the sign in its lobby stating "not accepting applications" and may take other steps, such as running ads in the newspaper.

3. Applicants must come to MJ's offices and complete an original MJ application blank. Applications filled out on photocopies of MJ's application blanks, or off the premises, will not be accepted. If applications are sent to MJ or left with MJ but not filled out on the premises, they will not be considered for any purpose.

4. APPLICANTS ARE FORBIDDEN FROM MARKING THEIR APPLICATION BLANKS TO SHOW RACE, RELIGION, COLOR, CREED, SEX, NATIONAL ORIGIN, AGE, LEGAL OUT-OF-WORK ACTIVITY, BANKRUPTCY, OR PROTECTED CONCERTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT. Applications filled out in MJ's office or delivered to MJ with any such information on them, or in connection with them will not be considered for any purpose.

5. No more than three applicants will be permitted in MJ's office at any one time. Friends, family members, and other representatives will be asked to wait outside.

6. We expect applicants to be qualified, ready, willing, and able to work, and courteous. Applicants who appear in our offices with audio or video taping equipment, or who engage in discourteous behavior while in our offices will be treated as trespassers and are subject to criminal trespass.

Compliance with these MJ procedures will maximize applicant's chances of being hired.

(CP Exh. 2.)

Significantly, the letter does not state that the Respondent hires, favors or gives preference only to referrals from employees or supervisors. Nor does it state that nonreferrals are hired only through temporary service agencies as the Respondent previously asserted in *MJ Mechanical II*. Finally, the letter does not identify categories of applicants and assign them priority hiring status.

C. *The Respondent's August 15, 2000 Written Hiring Policy*

Sometime in May/June 2000, the Respondent and its counsel, Thomas Gill, Esquire, began meeting to formulate a written hiring policy which was different from the policy enunciated in Poole's April 17, 1998 letter. (Tr. 260.) Respondent's President Poole testified that he and his management staff began discussing the written policy shortly after he offered employment to 27 discriminatees, who had applied for jobs in 1994, in order to cutoff their future backpay. (Tr. 260, 272.) After attempts to settle the compliance specification were unsuccessful, the Respondent proceeded to a compliance specification hearing on June 20, 2000, and implemented the written hiring policy on August 15, 2000.

The August 15, 2000 written hiring policy, which was not and has never been, placed in the MJ personnel manual, establishes a priority staffing structure which gives preference to categories of job applicants. It states, in relevant part:

PRIORITY STAFFING STRUCTURE

Category 1	Current employees (available transfers) Former company employees (in good standing)
Category 2	Current employee referrals, with knowledge of individual's skills and background Contractor association referrals Contractor associate referrals Other known and respected sources such as friends, relatives, etc. with knowledge of skills and background
	Important: In order to qualify as a bona-fide referral, the referring party must have the technical qualifications to judge a candidate's capabilities and must have specific, not casual knowledge of the candidate's experience and capabilities.
Category 3	Temporary employment agencies (short-term manpower needs only) Other company-specific business needs.
Category 4	Other external sources (ads, walk-ins, state employment agencies, etc.)

EMPLOYMENT APPLICATIONS WILL NOT BE ACCEPTED FROM CATEGORY 4 CANDIDATES FOR EMPLOYMENT EXCEPT DURING A PRE-ARRANGED SCHEDULED INTERVIEW.

ALL CATEGORY 4 CANDIDATES FOR EMPLOYMENT MUST SCHEDULE AN EMPLOYMENT INTERVIEW TO BE CONSIDERED FOR ANY EMPLOYMENT OPPORTUNITIES.

THE COMPANY WILL NOT ROUTINELY AND INDISCRIMINATELY DISTRIBUTE EMPLOYMENT APPLICATIONS TO ANYONE.

(GC Exh. 9.)

At the same time the Respondent implemented the August 2000 written hiring policy, it created the position of employment coordinator (EC) to oversee recruiting and to ensure that the priority staffing structure was "utilized without deviation."[8] The new written hiring policy authorized only the EC to accept or distribute employment applications and stated that "[u]nder no circumstances will employment applications be received or distributed in bulk." (GC Exh. 9 at 2.) It stated that "[o]nly original applications will be accepted. Applications will not be accepted

[8] James C. Pohlman is, and has always been, the only EC employed by the Respondent.

by mail. Incomplete applications will not be considered for employment." [9] (GC Exh. 9 at 3.) According to the written policy:

> Employment applications shall be considered active for 30 calendar days from the date the application for employment was received. All applications over 30 days old will be retired to an inactive application file and will not under any circumstances be considered for any current or future employment openings.

(GC Exh. 9 at 3.)

The EC is also responsible for entering applicant information on an "Applicant Flow Log (Form E-2) at the time an application is received from an applicant."

The Respondent did not internally publicize the August 15, 2000 written hiring policy. It was not disseminated to newly hired or current MJ employees. Nor was it included in the MJ personnel manual, when that document was revised in 2003. (GC Exh. 43.) Instead, the evidence shows that only EC James Pohlman, a few management personnel, and a half dozen department heads (DH) knew of the written hiring policy.

The Respondent also made no attempt to externally publicize the written hiring policy. There is no evidence that job applicants were not made aware of the written hiring policy or its contents. Nor is there any evidence that the Respondent told the Union about the policy. Although the evidence shows that the Union asked Pohlman at various times about the Respondent's hiring process, Pohlman never told the Union that there was a written hiring policy. (Tr. 213.) Indeed, at one point, EC Pohlman misinformed Union Organizer Paul Crist that resumes were kept on file for 90 days, rather than 30 days as stated in the written hiring policy.[10] (Tr. 100; GC Exh. 22.)

In December 2002, during the course of settlement negotiations concerning another charge, the Respondent's attorney, Thomas Gill, told Union Organizer Paul Crist that the Respondent had a written hiring policy. (Tr. 346-347.) Union Organizer Paul Crist requested a copy of the written hiring policy, which he received in December 2002.[11](Tr. 346-347.) Local 46 Organizer Chris Hollfelder testified that he first became aware that the written policy existed in December 2002 during the settlement discussions. (Tr. 411.)

D. *The Interview Selection Process*

James C. Pohlman, the Respondent's first and only employment coordinator, testified that in accordance with the written policy he logs all resumes that he receives on an "applicant flow log" which reflects the manner in which the applicant contacted the Respondent (e.g., mail-in, walk-in, referral, ad, etc.) (Tr. 83, 227.) Pohlman reviews the resumes and assigns each

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[9] Official MJ employment applications are only given to applicants who are selected for an interview and are provided to the applicant during the interview. It is therefore extremely unlikely that an original employment application would be submitted by mail.

[10] Pohlman initially testified that he did not recall telling Crist that he would retain resumes for 90 days, however, the credible evidence proves otherwise. (Tr. 142, 143; GC Exh. 21 and 22.)

[11] On January 30, 2003, the Union filed a charge in Case 3-CA-24062 alleging that the written policy was unlawful. (GC Exh. 1(e).)

applicant a "category number" (i.e., categories #1-4) based on his review of the resume. (Tr. 98.) Assigning applicants to categories to an extent is very subjective. It depends on whether the applicant was referred and by whom. It also depends on Pohlman's interpretation of the resume. (Tr. 97-98, 506.)

Walk-in applicants and those who respond to newspaper ads are automatically assigned to category #4, the absolute lowest category. A resume received from an applicant who attended a job fair also would be assigned to a category #4. A person referred by a temporary agency is assigned to a category #3.[12] (Tr. 146.) An applicant referred by a current or former employee or customer is automatically assigned to a category #2. However, Pohlman's testimony reveals that the notion of "customer referral" is broadly applied.[13] For example, he testified that a person who attended a Board of Cooperative Education (BOCES) or similar training program (e.g., ECCC and Universal Technical) or even a college for which the Respondent has performed work in the past would be a category #2 customer referral. (Tr. 149-151, 248-250.) On the other hand, an applicant who attended a college that Pohlman was unfamiliar or for whom the Respondent had never worked would be assigned to a category #4. (Tr. 150.) Pohlman testified that if a resume did not reflect that the applicant was referred by anyone, the applicant initially would be assigned to a category other than category #1 or 2. (Tr. 99-100.) If he later learned that the person was referred, Pohlman might note the referral on the resume and change the category designation. (Tr. 100.)

Pohlman explained that under the written hiring policy, he receives an employment requirement request form[14] from a DH, which shows the job that needs to be filled, the number of employees needed, the date needed, and the priority category from which the DH wants to fill the job. (R. Exh. 36.) Pohlman testified that he reviews the resumes on file starting with the highest category and proceeding to the next category down, instead of immediately going to the category requested by the DH. He selects the resumes which he determines satisfy the category requested. (Tr. 222.) Pohlman testified that he never deviates from the DH's request and that unless the DH puts down that he wants a category #4 applicant, no category #4 resume will be taken from the pile.

The evidence shows, however, that in early 2001, Pohlman filled four category #2 request positions with category #4 applicants. (Tr. 75, 240.) On February 26, 2001, DH Dan Demarco sought to fill 3 - 6 residential technicians with priority category #2 applicants. (R. Exh. 36.) The Respondent placed an ad in the local newspaper on March 10, 2001, soliciting applicants. (GC Exh. 13.) Pohlman interviewed four applicants who responded to the ad and hired two of them. (GC Exh. 10, p. 30.) He also placed another ad in the local newspaper on May 12 - 14, 2001, and interviewed another category #4 applicant, who was hired. (GC Exh. 13.) In other words, even though the DH requested category #2 candidates, Pohlman used his discretion to select five category #4 applicants to interview.

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[12] The evidence shows that between August 2000–July 2004 there were very few referrals from temporary employment agencies. (GC Exh.12.)

[13] The evidence shows that on direct examination Pohlman equivocated on whether a BOCES type referral could or would be assigned to a category #2 rating. (Tr. 149-151.) Upon further reflection, and after a lunch break, he corrected himself under cross-examination by the Respondent's counsel by stating that any applicant who attended a BOCES program would be considered a category #2 customer referral. (Tr. 248-250.)

[14] Despite the fact that Pohlman has held his current position for approximately 4 years, he was unsure at first exactly what the form was called. (Tr. 49.)

Pohlman nevertheless stated that it is virtually impossible for a category #4 person to be passed along to a DH, unless a category # 4 is indicated on the form. (Tr. 128.) Once Pohlman selects a resume that meets the employment request specifications, he discusses the results of his review with the DH, who tells him whether or not to contact a job applicant for an initial interview. (Tr. 93, 127.) No applicant receives an interview unless Pohlman advises them that they have been selected for an interview.

In his capacity as EC, Pohlman actually conducts the initial interview to obtain basic information about the applicant. During the interview, Pohlman gives the applicant an MJ employment application which the applicant completes and returns to Pohlman before the interview ends. Pohlman testified that he checks over the employment application to make sure that it is properly completed and that it meets all criteria established by the written hiring policy. (Tr. 94, 230.) Pohlman stated that he does a limited background check on the applicant by talking to whoever referred the applicant. (Tr. 89.) According to Pohlman, the DH conducts a second interview and actually hires the applicant. (Tr. 75; GC Exh. 8.)

E. *Inquiries, Applicants, Interviews, and Hirings*

1. Crist inquires about the Respondent's hiring procedures and requirements

In January 2001, Union Organizer Paul Crist visited the Respondent's webpage which directed visitors to contact its employee, Christine Nowak. On January 22, 2001, Union Organizer Paul Crist sent an e-mail to Nowak inquiring about the procedure and requirements for employment. (Tr. 305-306; G.C. Exh. 15.) Novak replied that the Respondent was not currently hiring, but indicated that she "would be happy to review your resume and letter of intent." Through an exchange of emails, the last being on February 5, 2001, Nowak reiterated that although the Respondent was not actively seeking resumes, Crist could mail his resume to Pohlman. Nowak did not tell Crist that the Respondent had a written hiring policy or that there was a procedure that had to be followed in order to get hired.

Sometime in February 2001, Crist and International Union Organizer Ed Hoffman went to the Respondent's offices, introduced themselves as representatives of the sheet metal workers union, and asked for employment applications. They were informed by the receptionist that she was not allowed to distribute employment applications.

In October 2001, and for many months thereafter, Crist sent several dozen resumes of Union applicants to James Pohlman. The cover letter that accompanied each batch of resumes stated that the applicants were "all qualified and experienced in the sheet metal HVAC field." (Tr. 317, 322.) As Crist explained, all the union applicants had participated in the Union apprenticeship program and were trained in layout, fabrication, welding, blueprint reading, balancing, and drafting. (Tr. 376.) Crist testified that he knew that all the union applicants were journeymen or apprentices, who have worked for contractors that the Union represents. (Tr. 367, 371.) He also had worked with several of them, to wit: Philip Asarese, Ronald Burns, Joseph Carlevarini, Joe DeCarlo, Robert Dippold, Richard Hoffhines, Roger Korsh, Jeffrey Meyer, Kurt Schidmit, Guy Smith, Tom Somogye, and Raymond Unger. (Tr. 367-368.)

2. October 2001– Crist submits several union applicant resumes

By letter, dated October 9, 2001, Crist mailed to Pohlman the resumes of the following Union members, which were received on October 11, 2001:

Asarese, Philip J.	Molik, Gerald R. (deceased)
Breslin, Dean D.	Piotrowski, Jr., Joseph
Burns, Jr., Ronald	Reisdorf, John
Carlevarini, Joseph M.	Ruchser, Thomas
Crist, Paul	Sass, David
Cultrara, David J.	Schmidt, Kurt T.
DeCarlo, Joseph	Schwartz, James
Everett, Richard. L.	Scibetta, Michael
Flattery, Walter	Smith, Guy P.
Goodenough, Bruce	Snuszki, Scott
Hoffhines, Richard	Somogye, Tom
Howard, Ian	Unger, Raymond
Korsh, Roger t.	Wizner, Darren
Livergood, Terry	Zybert, Tony
Meyer, Jeffrey	

(GC Exh. 16.)

More than half of these Union applicants were journeyman sheet metal/HVAC workers with significant industry experience. Approximately eight union applicants were apprentices with 2 - 4 years of course work, plus on-the-job training, to wit: Dean Breslin, Ian Howard, John Reisdorf, David Sass, James Schwartz, Scott Snuszki, Darren Wizner, and Tony Zybert. (GC Exh. 16.)

Although the Respondent needed to fill two residential technician positions that had been open since February 26, 2001, and a service-technician position that had been open since September 21, 2001, it did not interview any of the union applicants. (GC Exh. 10, p. 23 and 20.)

3. The Respondent interviews and hires several nonunion applicants

On October 15 and 16, the Respondent interviewed Joseph Abramo and Greg Rohrdanz, respectively, for the two residential technician openings.[15] The evidence reflects that two other nonunion applicants were hired and therefore neither Abramo nor Rohrdanz was offered a job. (GC Exh. 10, p. 28.) One of the new hires was Thomas Duffy, a former MJ employee, who submitted his resume to the Respondent on March 13, 2001, and was called for an interview on September 25, 2001. In other words, contrary to the written hiring policy, the Respondent held Duffy's resume for more than 30 days and called him for an interview 6 months later. (GC Exh. 10, p. 30, R. Exh. 37, and R. Exh. 36, p. 23.)

The other residential technician opening was filled by Robert Meisenburg, whose name is entered twice in the applicant log. On August 8, 2001, Meisenburg is listed as a category #4 mail-in applicant. (GC Exh. 10, p. 29.) On September 5, 2001, he is listed again as a category #2 applicant with a referral from a "Bob Pickman." Interestingly, on Meisenburg's employment application, dated September 27, 2001, he indicates that he was referred by "self." (R. Exh. 37.) When Pohlman interviewed Meisenburg on September 27, he noted on the interview sheet that Meisenburg was referred by a customer of the Respondent, Larry Kingston of National Gypsum. Meisenburg, however, was not employed by National Gypsum and the record does not reflect the basis of the Kingston referral. Meisenburg was

[15] There are no resumes or employment applications in the record for these nonunion applicants.

not hired until October 15, 2001, which was more than 30 days after he "mailed-in" his resume. (GC Exh. 10, p. 29, R. Exh. 36, p. 23.)

Two weeks later on October 30, 2001, Pohlman entered Eugene Kazmierczak's name in the applicant log and interviewed him for a service technician opening. There is no resume for him.[16] Kazmierczak's employment application shows that he had several years of HVAC mechanic/technician experience and that he was referred by employee Randy Petruso.

In the meantime, on October 15, 2001, DH Dan DeMarco requested three residential helper-trainees "asap." Two weeks later, on November 2, 2001, the Respondent interviewed and hired John Flood. (GC Exh. 10, p. 26; R. Exh. 10, p. 19; R. Exh. 37.) Pohlman entered Flood into the applicant log on November 2, but there is no resume for him. The employment application that Flood completed for Pohlman shows that he has no sheet metal/HVAC experience. Rather, Flood was working for a lawn care company when he applied for a job with the Respondent and prior to that he was a security guard. (R. Exh. 37.) According to Pohlman, however, Flood was referred by former MJ employee, Dave Velaquez and therefore he was given a category #2 rating.

Three days later, on November 5, the Respondent interviewed and hired Geoffrey Baumgartner. Pohlman entered him into the applicant log on that date. According to Baumgartner's resume and employment application he, like Flood, had no sheet metal/HVAC experience and had previously worked as an auto repair technician. Before that he was an electronics repair man. Pohlman gave Baumgartner a category #2 rating because he was referred by MJ employee Scott Ranick. (R. Exh. 37.)

One week later, on November 12, 2001, the Respondent interviewed and hired Jim Brainard, who Pohlman added to the applicant log even though Brainard does not have a resume. (R. Exh. 37.) His employment application shows Brainard had no sheet metal/HVAC experience. He worked for many years operating landscaping and snowplowing equipment. Pohlman gave Brainard a category #2 rating because he was referred by co-owner Jack Bergmann.[17]

4. The December 5, 2001 phone conversation with Pohlman

In early December 2001, Crist sought to ascertain the status of the resumes that he mailed to Pohlman in October 2001. He left a phone message for Pohlman, who returned the call on December 5, 2001. (Tr. 327; GC Exh. 22.) Crist taped recorded their conversation. (GC Exh. 21 and 22.) Pohlman acknowledged receiving the resumes, but told Crist that he was not interested in interviewing anyone. Pohlman told Crist that he would keep the resumes on file and that the Respondent normally kept resumes on file for 90 days. (Tr. 328; GC Exh. 21 and 22, pp. 2 - 3.)

5. January/February 2002–Crist submits several union applicant resumes

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[16] Pohlman testified that Kazmierczak was a former MJ employee. (Tr. 476.) There is no evidence to support that assertion. It does not appear on his employment application, it was not noted on the interview sheet, and it is not noted in the applicant log. (R. Exh. 37 and 36, p. 26.)

[17] The evidence shows that on December 18, 2001, the Respondent interviewed Peter Street for a service trainee position, but there is no corresponding employment requirement request for such a position. (Compare GC Exh. 10, p. 26 and R. Exh. 36, pp. 17-20.)

By letter, dated January 2, 2002, Crist mailed to Pohlman the resumes of the following union applicants:

Asarese, Philip J.
Benner, Timothy J.
Benzee, Douglas
Blasz, Joe
Brantell, Michael
Breslin, Dean D.
Burns Jr., Ronald
Carlevarini, Joseph
Crist, Paul
Cultrara, David J.
DeCarlo, Joseph
Dippold, Robert
Everett, Richard L.
Flattery, Walter
Fontana, William
Galla, Brian P.
Gietler, Harry
Hamm, Gerry
Hoffhines, Richard
Howard, Ian
Hunt, Jason
Kress, Steven
Lengen, Bob
Livergood, Terry
Manwaring, Amicia
Martin, Douglas
Meyer, Jeffrey
Piotrowski Jr., Joseph
Przybyla, Derek
Purucker, Richard
Reisdorf, John
Ruchser, Thomas
Sass, David
Schmidt, Kurt T.
Schwartz, James
Scibetta, Michael
Smith, Guy P.
Snuszki, Scott
Stevenson, Wayne
Unger, Raymond
Warner, Reginald E.
Wizner, Darren
Zybert, Tony

(GC Exh. 17.)

On February 26, 2002, Crist mailed the same resumes to Michael Poole, the Respondent's president.[18] (GC Exh. 18.) The majority of these union applicants were journeyman sheet metal/HVAC workers with significant industry experience. Approximately 20 out of 47 union applicants were apprentices with 2 or more years of course work, plus on-the-job training. (GC Exh. 17.)

Also on February 26, Crist sent an e-mail to the Respondent's employee, Christine Nowak, expressing an interest in working for the Respondent. The email stated that Crist had extensive training in HVAC sheet metal and that he "was taught the trade in apprentice school by current MJ employee Dave Velasquez, I'm sure Dave can attest to my ability to work with others and my work attitude as well as my training and hands on experience." Crist also asked Nowak to "[p]lease advise me on the proper way of becoming employed by MJ or Vastola." (GC Exh. 23.)

Nowak replied to the email the very same day. Unlike her prior e-mails 1 year earlier, she did not encourage Crist to mail-in a resume and cover letter. Instead, she stated:

> I have forwarded your transmission on to a few peole [sic]. We are not hiring at this time, but when help is needed, someone will contact you.

[18] The undisputed evidence shows that sometime in January 2002, Union Member Daniel Zybert went to the Respondent's office wearing a green union shirt. He requested an employment application, but was told by the receptionist that they were not accepting or giving them out. (Tr. 406.)

Nowak did not explain "the proper way of becoming employed by MJ or Vastola" which Crist asked her to do. Crist was never contacted by the Respondent, even though 3 days later an employment request was submitted for a residential technician.

6. The Respondent withdraws and does not fill certain openings

On or about March 1, 2002, an employment request was submitted for a residential technician. It was withdrawn one month later.[19] (R. Exh. 36, p. 18.) Yet, on May 13, 2002, Pohlman interviewed Nonunion Applicant Steven Lasker, even though there was no matching employment request. (GC Exh. 10, p. 20.) Lasker was offered an installation job, which he rejected.

7. May 2002–Crist submits several union applicant resumes

On May 23, 2002, Crist mailed to Poole a cover letter and the following union applicant resumes:

Brenner, Timothy J.
Breslin, Dean D
Burns Jr., Ronald
Carlevarini, Joseph M.
Crist, Paul
Cultrara, David J.
Dean, Paul S.
DeCarlo, Joseph
Dippold, Robert
Everett, Richard L.
Flattery, Walter
Fontana, William
Gietler, Harry
Hein, Robert
Hoffhines, Richard
Hoffman, Edward G.
Hunt, Jason
Kress, Steven
Lengen, Bob
Livergood, Terry
Manwaring, Amicia
Meyer, Jeffrey
Nidell, Bruce A.
Nuwer, Aaron
Pfarner Jr., Larry P.
Piotrowski Jr., Joseph
Ruchser, Thomas
Sass, David
Schmidt, Kurt T.
Scibetta, Michael
Smith, Guy P.
Snuszki, Scott
Stevenson, Wayne
Unger, Raymond
Warner, Reginald E.
Zorn, Jason
Zybert, Tony

(GC Exh. 19.)

8. The Respondent returns the union applicants' resumes and refuses to distribute employment applications

On May 30, 2002, Pohlman returned all of the May 2002 resumes to Crist along with the following letter:

> Thank you for your interest in employment with MJ Mechanical Services, Inc. and/or Vastola Heating & Air Conditioning. However, it is our company policy to accept only original applications. Unsolicited applications/resumes are not accepted by mail.

[19] On or about May 13, 2002, an employment request was also submitted for a service-helper/trainee and a refrigeration-helper/trainee. Neither position was filled. (See R. Exh. 36, p. 17.)

(GC Exh. 24.)

Pohlman did not specify which company policy prohibited mailing in resumes nor did he explain why he had accepted mail-in resumes for the past 2 years and logged them in the applicant log.

A few days later, on June 4, Crist and Union Member Andrew Smith went to the Respondent's Tonawanda office, introduced themselves as Union members, asked to fill out employment applications and were told by the receptionist that she was not allowed to give out any applications. The receptionist paged Pohlman, who met with Crist and Smith. (Tr. 342-344, 396.) According to Crist's testimony, as corroborated by Smith, Pohlman told them that he keeps resumes for 30 days only, not 90 days, and that he did not accept unsolicited applications off the street. Pohlman also told them that the only way to get hired by the Respondent was through an employee referral. (Tr. 343, 397-398.) Smith testified that when Crist asked for a pamphlet describing the Respondent's hiring policy, Pohlman told him that there was none available. (Tr. 398.)

9. The Respondent interviews and hires several nonunion applicants

On June 27, the Respondent interviewed and hired James Scungio to fill one residential technician position pursuant to a June 3 employment request. (GC Exh. 36, p. 16; GC Exh. 10, p. 19.) Scungio's resume shows that he worked for the Respondent from 1995-1998 and then simultaneously for two heating and air conditioning companies in Denver, Colorado from 2001 to present. There is no explanation for the 11-month gap in employment from January–November 1999. (R. Exh. 37.)

On July 31, 2002, the Respondent interviewed Bill Horvatis for an installation position, even though there is no corresponding opening in the applicant flow log during the active application period. (GC Exh. 10, p. 19.)

On August 1, 2002, DH Dave Szafranski submitted a request to fill three positions: a service technician, a service-helper trainee, and a refrigeration-helper trainee. (R. Exh. 36, p. 15.)

On August 9, the Respondent interviewed three nonunion applicants: Mark Burley, James Smith, and Michael Dalfanso. (GC Exh. 10, p. 19.) Burley's resume discloses that he never worked for the Respondent or for any other employer in New York. He did not attend a BOCES type training program for which the Respondent performed work and he did not have an employee referral. Rather, his resume reflects that he spent his entire work life on the West Coast where he went to school and worked as a service technician in Washington State and Arizona. (R. Exh. 37.) The evidence supports a reasonable inference that Burley either mailed-in his resume or walked it into the Respondent's office, both of which were contrary to company policy. Pohlman testified that Burley nevertheless was given a category #2 rating because he worked for a sister company of the Respondent: Tri-City Mechanical in Chandler, Arizona. On October 21, 2002, Burley began working in a service-technician position that was requested on the August 1, 2002 employment request.[20]

[20] Even though Burley filled this position, and even though there was no other employment request for a HVAC/service technician, the evidence shows that on January 6, 2003, the Respondent interviewed Jeffrey Stahl for a HVAC technician position. (R. Exh. 37, p. 18.)

Seven months later, on February 17, 2003, Matthew Cross was interviewed and hired for the service-helper/trainee. The Respondent did not provide a resume for him. He appears on the applicant log on February 17, 2003, as a category #2 employee referral with a notation by Pohlman that he was applying as a trainee/summer helper. Cross had no sheet metal/HVAC experience and had worked as a gas station attendant. Pohlman interviewed him on February 17, and hired him on that date. (GC Exh. 10, p.17.) Cross did not start working until April 28, 2003, and at that time filled the service-helper/trainee opening that was requested on the August 1, 2002 employment request. (R. Exh. 36, p. 15.)

Five months later, on July 30, 2003, Joshua Dullen mailed in a resume and cover letter stating that he was seeking "an entry-level position in commercial, industrial, and/or residential refrigeration.[21]" His resume shows that he recently had completed course work at the Universal Technical Institute (UTI) in Phoenix, Arizona and had no more than 3 months of sheet metal/HVAC work experience, which he acquired working a 2002 summer job. (R. Exh. 37.) Dullen nevertheless was interviewed and hired to fill the August 1, 2002 refrigeration-helper trainee opening. He began working on August 18, 2003. (R. Exh. 36, p. 15.)

10. January 2003 – Crist submits several union applicants' resumes

In the meantime, beginning on January 3, 2003 and every month thereafter through September 2003, Crist sent the resumes of experienced Union applicants to Pohlman.[22] (GC Exhs. 25-33.) Their education, training, and experience varied from very experienced, like Richard Hoffhines with 4 years apprenticeship coursework and 26 years journeyman work to entry level, like Douglas Martin with 2 years apprenticeship coursework and 3 years overall experience. Notably, all of the union applicants had work experience and training in the sheet metal/HVAC field, and none of them were landscapers, auto mechanics, or snow plow drivers.[23]

11. The Respondent interviews nonunion applicants and offers them jobs, even though there are no job openings

In February–March 2003, despite the fact that there were no employment requests to fill an opening for a HVAC laborer, HVAC trainee, or HVAC technician, the Respondent interviewed and offered jobs to four nonunion applicants. On February 25, Pohlman interviewed Michael Smith and Robert Oberst, Jr. for a HVAC trainee position, but the Respondent selected someone else for the job. (GC Exh. 10, pp. 17-18.) On March 11, Pohlman interviewed and offered a HVAC laborer job to Michael Moran, who rejected the job offer.[24] (GC Exh. 10, p. 18.) On March 18, Pohlman interviewed Chris Lane and offered him a HVAC technician job, but he rejected the offer. (GC Exh. 10, p. 16.) Careful scrutiny of Respondent Exhibit 36 reveals that

[21] Dullen obviously must have mailed in his resume and cover letter, unless he was a nonunion walk-in.

[22] As explained above, the unrebutted credible evidence shows that Crist and the Union first learned of the August 15, 2000 written hiring policy and first received a copy of that policy in December 2002.

[23] The undisputed evidence shows that in February 2003, Union Member Robert Lengen went to the Respondent's Tonawanda office wearing a Union jacket, requested an employment application, and was told by the receptionist that she was not allowed to hand them out. (Tr. 401-402.)

[24] Significantly, the Respondent received a mail-in resume from Moran on January 6, 2003, kept it for more than 60 days in contravention of the written hiring policy, and then crossed-out the "mail-in" on the applicant log and wrote over it "Alfred/BOCES/Mike ---" elevating Moran from a category #4 to a category #2 rating.

there were no employment requests to fill these positions between September 2002–late March 2003. (GC Exh. 10, pp. 14 -15.)

On March 24, 2003, an employment request was submitted for two service-technicians. On April 7, Pohlman interviewed and hired Michael Young, who was referred by Rich Pitt. Young had no sheet metal/HVAC experience. For the past 5 months, he was driving a mobile tool truck selling service tools to automotive technicians. Prior to that he worked for a car dealership as an auto body technician. On April 8, Pohlman interviewed Daryl Lewis for the remaining service-technician position and offered him the job, but Lewis rejected the job offer. Unlike Young, Lewis was not referred by anyone. Rather, the applicant log reflects that he worked for Comport Systems/USA, and therefore was assigned a category #2 rating.[25]

12. May 2003–Crist submits several union applicant resumes

On May 13, 2003, Crist sent Pohlman the following resumes:

Armstead, Darryl
Benzee, Douglas
Flattery, Walter
Hein, Robert
Hoffhines, Richard
Hughes, Kevin J.
Kress, Steven
Nuwer, Aaron
Purucker, Richard M.
Stevenson, Wayne
Unger, Raymond

In May 2003, the Respondent had several openings that needed to be filled. On May 19, 2003, an employment request was submitted for three residential technicians;[26] a separate employment request was submitted for one airside-installer and one installation-pipefitter; and another employment request for three airside-helper trainees and three installation-helper trainees.

13. The Respondent interviews and hires several nonunion applicants

On May 21, Pohlman interviewed Vincent Gimbrone who was hired for one of the residential technician openings. (GC Exh. 10, p. 14.) Gimbrone's resume, employment application, and interview sheet, however, are reported missing by the Respondent. (R. Exh. 37.) On the same date, Pohlman also interviewed Phillip McKnight for a residential technician opening and offered him a job, which he rejected. Thus, at the end of May, two of the residential technician positions were unfilled.

On June 2, Pohlman interviewed Bill Horvatis, a former MJ employee, who was hired for the installation pipefitter opening. On June 9, Pohlman interviewed Ronald Harmer, who was

[25] The evidence shows that the second service-technician position was eventually filled by a lateral move of a current employee, Eric Earsing. (R Exh. 36, p.14.)

[26] Three days later, on May 22, 2003, Pohlman interviewed and offered to hire Dale Miller for a service technician-trainee position, even though there is no record of an employment request or an opening for that position. (GC Exh.10, p.15.)

hired for the airside-installer opening. Harmer was referred by employee Mark Poole and his resume reflects that he was an experienced sheet metal/HVAC installer. (GC Exh. 10, p. 14; R. Exh. 37.)

On June 6, 2003, Crist sent Pohlman the same resumes that he sent to him in early May. Ten days later, June 16, 2003, Pohlman received a resume from Jason Dibb, whose cover letter states that he was "applying for a position at your company as advised by Dave Valasquez." (GC Exh. 10, p. 13; R. Exh. 36, p. 12.) Dibb's resume and employment application reflect that he was working as a painter for the past year and previously he had worked for a small company installing heating and air conditioning units. (R. Exh. 37.) On June 24, he was interviewed and then hired to fill the second residential technician opening.

Also on June 24, Pohlman interviewed William Weiss, who was hired to fill the third residential technician position. (R. Exh. 36.) Weiss worked for Sutton Place Apts., and because the Respondent had done work for Sutton Place, Pohlman assigned Weiss a category #2 rating. Pohlman also interviewed and hired Christopher Moran for one of the installation helper/trainee positions. There is no resume for Moran and his employment application shows that he has no sheet metal/HVAC work experience. (R. Exh. 37.) Moran received a category #2 rating and an interview because he was referred by MJ employee Tom Neff.[27] (GC Exh. 10, p. 12.)

On June 25, Pohlman interviewed Curtis Fisher and Daniel Kolb, who were hired for the airside helper/trainee openings. Neither has a resume or any sheet metal/HVAC training or experience. Rather, their employment applications show that they both worked for Bon Ton department store. Both were assigned a category #2 rating because they were referred by MJ employee, Tom Neff. Pohlman also interviewed and hired John Linstrom for an installation trainee/helper opening. He had no sheet metal/HVAC training or experience and last worked as a playground supervisor. Linstrom was assigned a category #2 rating and given an interview because he was referred by MJ employee Nick Buerster.

On June 26, an employment request was submitted for a sheetmetal/shop-fabricator. (R. Exh. 36, p. 10.) Pohlman interviewed and hired Daniel Dryer, a former employee who for three months during 1995 had worked installing duct work in Rochester, New York.

On July 7, the Respondent filled the last installation helper/trainee opening from one of the May 19 employment requests. Pohlman interviewed Adam Emminger, who has no resume and no sheet metal/HVAC training or experience. He previously worked stocking shelves at a Value Home Center and before that as a bag boy at a country club. Emminger was hired and given a category #2 rating because he was referred by MJ employee Nick Buerster.

14. Additional employment requests are submitted and filled

On July 2, Crist sent Pohlman most of the resumes that he had mailed to him in May and June. (GC Exh. 31.) Two weeks later, on July 15, an employment request was submitted for two more installation helper/trainees and on July 16, an employment request was submitted for a part-time sheet metal/shop helper/trainee. (R. Exh. 36, pp. 8-9.) The Respondent moved to fill these openings quickly. On July 16, Pohlman interviewed Matthew Buczkowski, who does not have a resume. He had no prior sheet metal/HVAC training or experience and was hired for an installation-helper opening. The following day, Pohlman interviewed Nicholas Haines, who had no resume and no sheet metal/HVAC training or experience, but was hired to fill the other

[27] On June 24, Pohlman also interviewed Ryan Ellis for an airside-helper/trainee opening and offered him the job, but Ellis rejected the offer. (GC Exh. 10, p. 13.)

installation-helper/trainee opening. Both Buczkowski and Haines were given category #2 ratings because they were referred by MJ employees.

On July 17, Pohlman interviewed David McArthur for the part-time sheet metal helper/trainee opening. McArthur had no resume, but his employment application shows that since 1984, he had worked as a sanitation supervisor and prior to that job he worked in some undefined capacity for the Respondent. McArthur was hired and assigned a category #2 rating because he was a former employee and referred by DH Dave Velaquez.

15. August 2003–Crist sends Pohlman several union applicant resumes and the Respondent fills several openings with nonunion applicants

On July 30, 2003, Crist sent Pohlman the following union applicant resumes:

DeCarlo, Joe
Dean, Paul S.
Flattery, Walter
Fontana, William
Hoffhines, Richard
Lengen, Bob
Nidell, Bruce A.
Pfarner, Jr., Larry
Schmidt, Kurt
Smith, Guy P.
Warner, Reginald

(GC Exh. 32.)

In August 2003, the Respondent needed to fill several openings. On August 1, an employment request was submitted for two residential technicians and two residential helper/trainees. (GC Exh. 10, p. 7.) On July 31, Kyle Fyfe mailed his resume to Pohlman along with a cover letter stating that he recently graduated from a BOCES training program. Fyfe's letter asked if the Respondent had a position available for a HVAC technician or a HVAC helper? Even though Fyfe's submission was a mail-in, Pohlman entered it in the applicant log as a "BOCES" referral source, rather than mail-in, and assigned Fyfe a category #2 rating. On August 6, Pohlman interviewed Fyfe, who was hired for a residential helper/trainee opening. (R. Exh. 36, p. 7; GC Exh. 10, p. 11.) The evidence shows that the Respondent did not fill the remaining open positions from the August 1 request.

On August 4, an employment request was submitted for an installation helper/trainee. (R. Exh. 36, p. 6.) On August 12, Pohlman interviewed Rafal Sowa, who had no resume and whose employment application is blank, except for his name, address, referral, and the college he was attending. Sowa was assigned a category #2 rating because he was referred by his uncle, an MJ employee. He was interviewed and hired to fill this opening.

Acting on a resume and cover letter that he received in the mail on July 30, 2003, Pohlman interviewed Joshua Dullen on August 18. (GC Exh. 10, p. 11; R. Exh. 37.) Dullen had attended the Universal Technical Institute and worked 1 month in the air conditioning and heating company. Despite the fact that he mailed in his resume, he was entered in the applicant log as a "college recruiting" UTI/BOCES referral and assigned a category #2 rating. He was also hired to fill a refrigeration helper/trainee position that had been held open for more than 1 year as reflected on the August 1, 2002 employment request. (R. Exh. 36, p. 15.)

On August 22, an employment request was submitted for two refrigeration helper/trainees. On August 28, 2003, the Respondent placed an ad in the local newspaper soliciting resumes by mail for a commercial refrigeration technician with a minimum 5 years experience. (GC Exh. 13a.) Five nonunion applicants responded to the ad and the Respondent accepted and logged in all of their resumes. (GC Exh. 10, p.10.)

On September 2, Crist sent Pohlman the same resumes that he mailed to him on July 30, 2003. (GC Exh. 33.) None of the union applicant resumes reflect any training or experience in commercial refrigeration.

On September 18, Pohlman interviewed Brian Bradford, who responded to the ad. He had less than 5 years refrigeration experience, but was hired nonetheless. (R. Exh. 37.) The evidence reflects that the Respondent determined that it did not need a second refrigeration technician. (GC Exh. 10, p. 5.)

16. Joe DeCarlo sends Pohlman several union applicant resumes

In the fall 2003, Union Organizer Joe DeCarlo began sending the resumes of union applicants to Pohlman. (GC Exh. 35-42.) In addition to working for union contractors, DeCarlo was a welding instructor in the apprenticeship program. He testified that he knew most of the union applicants for whom he submitted resumes through work and through the apprenticeship program. (Tr. 381.)

On October 6, 2003, an employment request was submitted for four residential technicians and three residential helper/trainees. Two days later, on October 8, Union Organizer Joe DeCarlo sent to Pohlman the resumes of 11 Union applicants, whose training and experience in sheet metal/HVAC and welding varied from 3 to 30 years. (GC Exh. 35.)

The Respondent nevertheless placed an ad in the local newspaper soliciting applicants for these residential helper/trainee openings. (GC Exh. 10, pp. 6-7.) On October 29, Pohlman interviewed three nonunion applicants, who responded to the ad (Stacey Plumey, Jeffrey Sampson, and Francisco Tirado).[28] Plumey was not hired because he failed a drug test. The other two were not hired because another nonunion applicant was selected. The evidence also shows that on October 29, Pohlman interviewed Jason Brock, who had no sheet metal/HVAC training or experience. Brock was given a category #2 rating because he was referred by an MJ employee.[29] Brock was hired as a residential helper/trainee. (R. Exh. 36, p. 4; R. Exh. 37.) On October 30, Seth Bowker, who submitted a resume stating that he wanted to “find employment with your company,” was interviewed. (R. Exh. 37.) Bowker had no sheet metal/HVAC training or experience and was working as a “stocker and bagger” in a grocery store. He was given a category #2 rating and hired as a residential helper/trainee.

The third residential helper/trainee that was hired was Aaron Derkovitz. Pohlman interviewed him on November 15, 2003. He does not have a resume, but his employment

[28] On October 28, Pohlman interviewed nonunion applicant Kevin Burke, who was not hired because another applicant was selected.

[29] The evidence viewed as a whole supports a reasonable inference that when Pohlman received a mail-in resume from an applicant who was referred by an employee, customer, or who attended a BOCES type program, he would record the resume in the applicant log as a “referral” rather than a “mail in.”

application shows that he had no sheet metal/HVAC training or experience. Instead, Derkovitz worked for 5 years pouring concrete. (R. Exh. 37.)

With respect to the four residential technicians that were part of the October 6, 2003 employment request, Pohlman's handwritten notation on Respondent Exhibit. 36 at page 4, reflects that he did not interview anyone for those openings and instead noted that as of December 1, 2003, the three residential helper/trainees Brock, Bowker, and Burke (who had no sheet metal/HVAC training or experience) satisfied the requirements for those openings.

On November 12, Pohlman interviewed Vincenzo Filice for an installation helper/trainee opening that was requested on October 15, 2003. (R. Exh. 36, p. 3.) Filice, was a journeyman plumber/fitter who was laid off by the Plumbers and Steam Fitters UA Local 666 in Thorold, Ontario, was hired to fill this opening. He received a category #2 rating because he was referred by an MJ employee Craig Wittmann.

17. DeCarlo sends Pohlman union applicant resumes on a monthly basis

Between December 2, 2003, and June 2, 2004, Union Organizer Joe DeCarlo sent Pohlman the resumes of union applicants on a monthly basis. (GC Exh. 37–42.) On January 14, 2004, an employment request was submitted for a balancing technician, a position which requires a certain degree of training and skill to ensure that the airflow is properly distributed throughout the system. On February 3, 2004, Pohlman interviewed Robert Oberst, Jr., the son of MJ employee, Robert Oberst, Sr. Oberst, Jr.'s resume reflects that he had absolutely no sheet metal/HVAC training experience, but had worked delivering appliances and before that as a cook. (R. Exh. 37.) Indeed, one year earlier, in February 2003, Pohlman interviewed him for a HVAC trainee position, but another applicant was selected instead. (See GC Exh. 10, p. 17.)

On May 10, 2004, an employment request was submitted for a service helper/trainee. On May 26, Pohlman interviewed John Piper, who had no sheet metal/HVAC training or experience to mention. He had been doing general maintenance at a small hospital, had worked as a machine mechanic, and several years before assisted his father, who was an electrician and hvac engineer. (R. Exh. 37.) Piper initially was recorded as a "mail-in" on the applicant log, but was changed to a category #2 rating because he was referred by co-owner Jack Bergmann. He was hired for the opening.

F. *Analysis and Findings*

1. Section 10(b) defense

Paragraph VI (a) of the amended consolidated complaint alleges that since August 15, 2000, and thereafter, the Respondent adopted and maintained the written hiring policy in order to exclude from consideration for employment job applicants on the basis of their union affiliation.

The Respondent asserts that this allegation is time-barred by Section 10(b) of the Act because the underlying charge was filed l7 months after the Respondent internally promulgated the written hiring policy. It argues that the written hiring policy is merely a restatement of its past

practices, which the Union should have known about because it read the administrative law judge's decision in *MJ Mechanical* II. The argument is unpersuasive.[30]

Recently, in *St. Barnabas Medical Center,* 343 NLRB No. 119, slip op. at 2-3 (December 2004), the Board stated:

> Section 10(b) provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board …." 29 U.S.C. § 160(b). However, this limitation period does not begin to run until the charging party has "clear and unequivocal notice," either actual or constructive, of a violation of the Act. *Leach Corp.,* 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of the reasonable diligence. *Moeller Bros. Body Shop,* 306 NLRB 191, 193 (1992) …See also *John Morrell & Co.,* 304 NLRB 896, 899 (1991) (10(b) period begins to run when "aggrieved party knows or should know that his statutory rights have been violated.")
>
> The burden of showing such notice is on the party raising the affirmative defense of Section 10(b). *Chinese American Planning Council,* 307 NLRB 410 (1992).

The undisputed evidence shows that in December 2002, during settlement negotiations concerning another charge, the Respondent's attorney told Union Organizer Paul Crist that the Respondent had a written hiring policy and that he subsequently provided the Union with a copy of the policy. (Tr. 347, 349.) Crist credibly testified that prior to receiving a copy of the written policy, he had no knowledge of the Respondent's specific hiring practices. (Tr. 376.) The undisputed evidence further shows on January 30, 2003, the Union filed the charge in Case 3-CA-24062 alleging that the written policy was unlawful. (GC Exh. 1(e) and (g).) Thus, there is no evidence that the Union had actual knowledge of the written hiring policy more than 6 months prior to filing the charge. Rather, the evidence shows that the Union promptly filed a charge shortly after learning about the written hiring policy.

Contrary to the Respondent's assertions, the evidence does not show that the Union had constructive knowledge of the written hiring policy. Despite the Respondent's repeated assertions that the written hiring policy was merely a restatement of its past hiring policy, the evidence reflects otherwise. The hiring policy outlined in the April 17, 1998 letter (a post *MJ Mechanical II* policy) and the August 15, 2000 written hiring policy are two very different policies. The former does not even mention employee or supervisor referrals, temporary employment agencies, trade schools or any other category of referrals that is delineated in the latter. While the Respondent has encouraged its employees to refer people for jobs and it has occasionally used temporary employment agencies in the past, there is no evidence showing that an application received from one source was given priority consideration over an application received by any other source. More specifically, there is no evidence showing that prior to August 2000, an applicant who was referred by a customer or a contractor association would be

[30] In addition, the Respondent's argument ignores the fact that in *MJ Mechanical II*, Judge Arthur J. Amchan concluded that the Respondent's articulated hiring policy was unlawful and inherently destructive of the Union's Section 7 rights.

given priority consideration over an applicant who mailed in a resume. To the contrary, a plain reading of *MJ Mechanical I* shows that in 1994, prior to learning that the Union was seeking to organize its employees, the Respondent interviewed and hired several union applicants who had no referrals (e.g., Paul Colon, Steven Derleth, Don Litoff), offered to interview several others, and did interview Mark Roberge and Dean Weiss, even though they were not "referred" by anyone connected to the Respondent.

Although Pohlman had ample opportunity to disclose to Crist that there was a written hiring policy, he failed to do so. For example, Pohlman did not recall whether he or anyone else ever informed the Union about how the interview process worked. He did not inform the Union about the rule regarding "bulk" mailings. (Tr. 213.) The credible evidence shows that on June 4, 2002, when Union Organizer Crist asked Pohlman in person "how do we get hired at MJ," Pohlman told him that the only way to get hired was through an employee referral. (Tr. 343.) Pohlman did not tell Crist that there was a written hiring policy or there were other ways that the Respondent accepts resumes. Although the Respondent argues at page 16 of its posthearing brief that "Pohlman had no duty to give Mr. Crist a copy of the policy. In fact, he had no duty to talk with him at all," one has to ask what could be the motivation for concealing such information?"

Under these circumstances, I find that the Respondent has failed to prove its affirmative 10(b) defense that the allegation contained in paragraph VI (a) of the amended complaint is time barred.

The Respondent also asserts that the "charge concerning walk-in applications was filed outside the Section 10(b) period." Although there is no specific allegation in the amended complaint that references "walk-in" applicants, it can be inferred from Respondent's posthearing brief at page 15 that the Respondent is referring to paragraph V (b) of the amended complaint, which alleges that the Respondent unlawfully refused to distribute employment applications to job applicants. The Respondent argues that in 1996, it placed a sign in its lobby stating "Currently not accepting applications," and stopped taking walk-in applications at that time, which should have alerted Union Organizer Paul Crist to that fact as early as 1998, when he stopped by the Respondent's office and was told that the Respondent was not accepting applications. I reject the argument.

There is more than a shade of difference between telling a walk-in that the Respondent is not accepting applications and telling him that we are not allowed to give out employment applications. The Respondent has not shown that Crist or any other Union member was told prior to August 2000, that it was against the Respondent's policy to distribute employment applications. Nor does the evidence viewed as a whole support an inference that he should have known that was the case. Rather, the undisputed evidence shows that in *MJ Mechanical II,* the Board, and the DC Circuit Court of Appeals, ordered the Respondent to cease and desist from refusing to distribute employment applications to applicants because of the applicants' union affiliation. The evidence also shows that between February 2001 and June 2002, the Respondent on several occasions refused to give Crist and other Union members its employment application, thereby making it a continuing violation as alleged in the amended complaint.

Based on the above, and the continuing nature of the violation, I find that the Respondent has failed to prove that paragraph VI (b) of the amended complaint is barred by Section 10(b) of the Act.

2. The refusal to consider allegation

This is a refusal to consider case. Paragraph VII (a) of the amended complaint states that "[s]ince on or about August 15, 2000, and continuously thereafter, Respondent has refused to consider for employment employee-applicant members of the Union, by engaging in the conduct described above in paragraphs VII (a) through (d)." There is no refusal to hire allegation in the amended consolidated complaint.

Paragraph VII (a) of the original consolidated complaint that issued on August 30, 2002, contained a refusal to hire allegation. (GC Exh. 1(j).) On October 24, 2003, the Regional Director approved the withdrawal of the refusal to hire allegation in the underlying charge and deleted that allegation from the amended consolidated complaint, which issued on the same date. In his opening statement at trial, the General Counsel did not assert a refusal to hire issue nor did he do so in his posthearing brief. Finally, during the trial, counsel for the General Counsel stated that there was no refusal to hire allegation in this case.[31] (Tr. 322-323.)

The General Counsel argues that the Respondent has a neutral hiring policy that was applied in a discriminatory manner for the purpose of inhibiting union activity. It does not allege that the Respondent's hiring policy on its face violates the Act. The General Counsel also asserts that the policy as applied is inherently destructive of union applicants' Section 7 rights. Finally, the General Counsel asserts that the Respondent independently violated Section 8(a)(1) and (3) of the Act by refusing to distribute employment applications to job applicants based on their union affiliation and by refusing to accept resumes by mail.

The Charging Party Union argues that the written hiring policy is not neutral on its face because it was designed to discriminate against union member applicants.[32] It also asserts that the policy was discriminately applied and that it is inherently destructive of Section 7 rights.

The Respondent argues that the written hiring policy is neutral and nondiscriminatory and nothing more than a restatement of his past hiring policy. It argues that it developed and implemented the written hiring policy in an effort to comply with the Board's decision in *MJ Mechanical II* and to ensure that its hiring practices were applied consistently. It further asserts that it has applied the written hiring policy in a uniform and consistent manner.

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[31] On July 9, 2004, Charging Party Local 71 filed a new charge alleging that since January 2001, the Respondent has unlawfully maintained a provision in its current personnel manual that threatens employees with the loss of benefits if they choose union representation and further alleges the Respondent has unlawfully refused to hire union member job applicants. On September 30, 2004, 1 month after posthearing briefs were filed in this case, the General Counsel filed a motion to amend the amended complaint, reopen the record and reconvene the hearing in this case to litigate these issues, which I denied by Order, dated October 29, 2004, because the General Counsel and the Charging Party failed to assert and show that there was newly discovered evidence that warranted reopening the record and reconvening the hearing. In addition, I found that it would be unjust to grant the amendment under these circumstances, including the delay in making the motion, the fact that the issues had been fully briefed, and the fact that no adequate reason for the delay or basis for the motion had been asserted. A motion to reconsider was similarly denied for the reasons stated in the prior Order.

[32] It is well established that the General Counsel, not the Charging Party, determines the theory of the case. *Ken Maddox Heating & Air Conditioning,* 340 NLRB No. 7, slip op. at 2 (2003); *Teamsters Local 282 (E.G. Clemente Contracting),* 335 NLRB 1253, 1254 (2001). Applying this principle here, I decline to consider the Charging Party Unions' argument that the written hiring policy is not neutral on its face.

a. *The legal standard*

In *FES,* 331 NLRB 9 (2000), the Board set forth the analytical framework for a refusal to consider (and refusal to hire) allegation. In order to establish a discriminatory refusal to consider violation, the General Counsel must show:

> (1) that the respondent excluded applicants from a hiring process; and
> (2) that antiunion animus contributed to the decision not to consider the applicant for employment.

Once the General Counsel has met his initial evidentiary burden, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *Quality Mechanical Insulation, Inc.,* 340 NLRB No. 91, slip op. at 14 (2003); *Wayne Erecting, Inc.,* 333 NLRB 1212 (2001).

b. *The General Counsel's evidentiary showing*

1. Union applicants were excluded from consideration for hiring

The undisputed evidence shows that after the Respondent implemented the written hiring policy, not a single Union member, who submitted a resume or asked to complete an employment application, was given an interview or was allowed to complete an employment application. Pohlman testified that he did not know of any Union applicant that submitted a resume that was considered for hire. (Tr. 174, 213.)

A review and analysis of GC Exh. 10 shows that between the years 2000–2004, approximately 613 job applicants sought employment with the Respondent for the jobs delineated on the employment requirement request form. (R. Exh. 36.) The evidence further shows that more than half of these job applicants (i.e., 319 out of 613 or 52 percent) were Union members. Of the 613 applicants, approximately 434 or 71 percent were mail-in resumes and of those approximately 319 or 74 percent were Union applicants. In other words, the majority of job applicants were Union members, who applied for employment by mail, yet under the written hiring policy not a single Union applicant was interviewed for a job.

2. The written hiring policy was not uniformly applied

Contrary to Pohlman's generalized assertions that he uniformly adhered to and consistently applied the written hiring policy, the evidence viewed as a whole shows the following.

a. The Respondent interviewed nonunion applicants, who had resumes on file for more than 30 days

The written hiring policy states that:

> Employment applications shall be considered active for 30 calendar day from the date the application for employment was received. All applications over 30 days old will be retired to an inactive application file and will not under any circumstances be considered for any current or future employment openings.

(GC Exh. 9, p. 3.)

Pohlman explained that a resume is a handwritten or typewritten form received from an applicant that is kept on file for 30 days only. (Tr. 88.)

The evidence shows, however, that nonunion applicant Thomas Duffy was called for an interview 6 months after he submitted a resume to the Respondent (GC Exh. 10, p. 30) and nonunion applicant Robert Meisenburg was interviewed 49 days after he submitted his resume. (GC Exh. 10, p. 29.) Nonunion applicant Salvatore Alaimo sent in a resume on March 12, 2001, and was interviewed for a job on June 28, 2001. Pohlman testified that Alaimo reapplied again on May 22, 2001. (Tr. 497.) Even so, when he was interviewed his resume was more than 30 days old, which purportedly was contrary to policy.

b. Nonunion applicants, without resumes, were added to applicant flow log and interviewed

Pohlman also testified that the applicant flow log reflects the date that all resumes are received and how the applicant made contact (i.e., walk-in or mail-in or referral). (Tr. 82, 86-87.) He stated that he decides what category an applicant falls into based on his review of the resume. (Tr. 97-98.) Several nonunion applicants, who do not have resumes, were added to the applicant flow log, interviewed and allowed to complete employment applications. William Weiss and Christopher Moran were interviewed on June 24, 2003. Daniel Kolb and Curtis Fisher were interviewed on June 25, 2003. Adam Emminger was interviewed on July 7, 2003. Matthew Buczkowski was interviewed on July 16, 2003. Nicholas Haines and David McArthur were interviewed on July 17, 2003. None of them has a resume and Pohlman did not explain why there was no resume for them. Several other nonunion applicants, who do not have resumes, were interviewed and provided an employment application: Jim Brainard, Vincent Gimbrone,[33] Rafael Sowa, Joseph Abramo, and Greg Rohrdanz. Pohlman did not explain how he determined which category to place them or how he selected them for an interview.

Pohlman testified that he conducts an interview to obtain basic information about an applicant and checks over the employment application to make sure that it is properly completed and that it meets all criteria established by the written hiring policy. (Tr. 94, 230.) However, Rafal Sowa did not have a resume and his employment application is blank, except for his name, address, phone number, and referral. Pohlman testified that Rafal's uncle worked for the Respondent and had told Pohlman that his nephew, who attends the University of Poland, was looking for a summer job. Based on that limited information, Pohlman interviewed Rafal Sowa, but he did not require him to completely fill-in the employment application.

c. Nonunion applicants were interviewed and offered jobs, even though there was no department head employment request

The written hiring policy states that:

> Department Heads are responsible for determining hourly craft manpower needs.
>
> Department Heads will determine the need for additional manpower and forward a completed New Employee Request Form (E-1) to the Employment Coordinator

(GC Exh. 9, p. 1.)

[33] Also, there is no employment application for Gimbrone.

According to Pohlman, the DH fills out the request identifying the opening to be filled, the number of employees needed, and the category from which he wants the position to be filled. He testified that he reviews the resumes for the category designated by the DH and gives them to the DH. Pohlman stated that he never deviates from the DH's request. (Tr. 75, 93.) He also added that unless a DH puts down that he wants a category #4 applicant, no one will be taken from that pile. It is virtually impossible for a category #4 applicant to be passed along to a DH, unless category #4 is listed on the form. (Tr. 93.)

Despite the provisions of the written hiring policy, as well as Pohlman's assertions, the evidence shows that several nonunion applicants were interviewed and offered jobs, even though there is no corresponding DH employment request forms indicating any job openings. (Compare GC Exh. 10 and R. Exh. 36.) On December 18, 2001, Peter Street was interviewed for a service trainee position. On March 1, 2002, Steven Lasker was interviewed for an installation position. On July 31, 2002, Bill Horvatis was interviewed for an installation position, even though the applicant flow log reflects that there was "no position available [for him] during active application." On January 6, 2003, Jeffrey Stahl was interviewed and was offered a HVAC service technician position. In February–March 2003, despite the fact that there were no employment requests to fill an opening for a HVAC laborer, a HVAC trainee, or HVAC technician, the Respondent interviewed and offered jobs to nonunion applicants Michael Smith, Robert Oberst, Jr., Michael Moran, and Chris Lane.

d. The Respondent allowed nonunion walk-in applicants to apply for a job

Even though the written hiring policy countenances walk-in applicants under category #4 external source, the Respondent has, and has had, a sign in its front office ostensibly to discourage walk-in applicants. Notwithstanding the sign, however, the Respondent allowed nonunion walk-in applicants to apply for jobs. On March 1, 2002, Louis Arroyo was a walk-in applicant for a warehouse job (GC Exh. 10, p. 20.) On January 1, 2002, Louis Falsone was a walk-in applicant for a sheet metal job. (GC Exh. 10, p. 23.) On November 27 and December 4, 2001, Art Dory and Alvin Edwards, respectively, were walk-in applicants for service technician jobs. (GC Exh. 10, p. 26.) In contrast, when Union applicants Crist, Hoffman, Zybert, Smith, and Lengen at various times visited the Respondent's office, and asked to complete an employment application, they were turned away by the receptionist.

e. The Respondent rejected and returned only Union mail-in resumes

In January 2001, Christine Nowak encouraged Crist to mail in a cover letter and resume. In December 2001, Pohlman told Crist over the phone that he could mail in resumes. The applicant flow log shows that prior to May 30, 2002, Pohlman received and recorded numerous mail-in resumes. By letter, dated May 30, 2002, Pohlman nevertheless advised Crist that "[u]nsolicited applications/resumes are not accepted by mail" which was obviously contrary to practice–past, present and future–of accepting resumes by mail, which is not expressly or implicitly prohibited by the written hiring policy. There is no evidence showing that the Respondent told any nonunion applicant at any time that it was against company policy to accept mail-in resumes and returned resumes to the nonunion applicant.[34]

[34] Effectively this evidence shows that not only did the Respondent disparately implement and apply its written hiring policy, but by prohibiting walk-in applicants from the Union and rejecting their mail-in resumes, it precluded union applicants from applying for employment. While the Respondent may argue

Continued

f. Pohlman subjectively assigned nonunion applicants to a higher priority category

The evidence further shows that the manner in which Pohlman assigned priority categories to nonunion applicants was more subjective than objective compared to Union applicants. Robert Meisenburg's name is entered twice in the applicant log. On August 8, 2001, Meisenburg is listed as a category #4 mail-in applicant. (GC Exh. 10, p. 29.) On September 5, 2001, he is listed again but as a category #2 applicant with a referral from a "Bob Pickman." Interestingly, Meisenburg's employment application, dated September 27, 2001, indicates that he was referred by "self." (R. Exh. 37.) When Pohlman interviewed Meisenburg on September 27, he noted on the interview sheet that Meisenburg was referred by a customer of the Respondent, Larry Kingston of National Gypsum. There is no evidence that Meisenburg was ever employed by National Gypsum and the record does not reflect the basis for Kingston's referral. (GC Exh. 10, p. 29; R. Exh. 36, p. 23.) Pohlman did not elaborate on his decision to give Meisenburg a category #2 rating nor did he explain the discrepancy in the referral sources.

Nonunion applicant Joshua Dullen also mailed in his resume and cover letter. Dullen did not have an employee referral, but a BOCES type school. The applicant flow log shows that his referral source was "college recruiting," a category not specified in the written hiring policy, but which Pohlman testified was the equivalent to a category #2 if the applicant attended a school familiar to Pohlman. On that basis, he was granted an interview and allowed to complete an employment application.

Similarly, on January 6, 2003, the Respondent received a mail-in resume from nonunion applicant Michael Moran, which was initially logged in as a "mail-in." The Respondent kept the resume for more than 60 days in contravention of the written hiring policy, and Pohlman crossed out the "mail-in" on the applicant flow log and wrote over it "Alfred/BOCES/Mike—" which elevated Moran from a category #4 to a category #2. He was offered a job which he rejected.

Another example of the subjective implementation of the written hiring policy involves nonunion employee Mark Burley. His resume discloses that he never worked for the Respondent or for any other employer in New York. He did not attend a BOCES type training program for which the Respondent performed work and he did not have an employee referral. Rather, his resume reflects that he spent his entire work life on the West Coast where he went to school and worked as a service technician in Washington State and Arizona. (R. Exh. 37.) Pohlman testified that he gave Burley a category #2 rating because he worked for a sister company of the Respondent: Tri-City Mechanical in Chandler, Arizona.

Thus, the evidence shows that the Respondent frequently departed from its written hiring policy and failed to uniformly apply that policy. Indeed, there is no evidence showing that any Union applicant was granted any accomodation or was afforded any flexibility in the treatment of his application. Thus, the evidence viewed as a whole shows that the written hiring policy was not uniformly applied to Union and nonunion applicants alike.

2. Union animus

There is ample evidence of union animus in this case. To begin with, the Board has held that evidence of unequal treatment is sufficient to satisfy the General Counsel's evidentiary burden. *Norman King Electric,* 334 NLRB 154, 158 (2001); *New Otani Hotel & Garden,* 325

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that union applicants could have applied through a temporary employment agency, the unrebutted evidence shows that Pohlman never informed the Union of that option.

NLRB 928 fn. 2 (1998). The unequal treatment of walk-in Union applicants and the rejection of mail-in Union applicant resumes, standing alone, is sufficient to support an inference of animus.

In addition, the Respondent's lack of any deference to applicants who completed Union apprenticeship training while routinely assigning a category #2 priority to BOCES-trained applicants and automatically assigning a category #3 priority to applicants referred by a temporary employment agency supports an inference of animus. The Respondent never gave any explanation for its outright refusal to acknowledge the experience and training of applicants who had completed the Union apprenticeship program. It certainly was familiar with the caliber of workmanship of someone who had attended the apprenticeship program. Respondent's President Poole testified that both his father and grandfather belonged to a union. The evidence shows that in *MJ Mechanical I*, the Respondent hired some union members before it realized that they were attempting to organize its work force, and never took issue with the quality or quantity of their work. The fact that the Respondent showed no deference to a Union apprenticeship graduate, while accomodating BOCES and UTI and other training institute graduates supports an inference of animus.

Animus can also be inferred from the unrebutted evidence showing that the Respondent failed to provide the Union with information about its hiring process, despite repeated requests for the same. In January 2001, Crist e-mailed Nowak asking her to explain the Respondent's hiring procedures, but she never answered his question. When Crist met with Pohlman in June 2002, he again asked him to explain the Respondent's hiring procedures, but Pohlman did not tell him about the written hiring policy or explain how that policy works. It was not until December 2002, 2 years after the written hiring policy was implemented, that the Respondent indirectly informed the Union that it had a written hiring policy and subsequently provided a copy. In addition, animus can be inferred from the evidence showing that the information that the Respondent did provide to Crist was incorrect and misleading. For example, in December 2001, Pohlman told Crist in a telephone conversation that he kept resumes on file for 90 days. Several months later, Pohlman told Crist that resumes were kept for 30 days only. Why would the Respondent conceal information about the existence and content of its written hiring policy and disseminate inaccurate information about the same policy, unless the intended consequence was to preclude union applicants from successfully applying for jobs.

Further evidence of union animus is reflected in the provisions of the Respondent's "Personnel Policies, Practices and Procedures Manual" that was revised and implemented in January 2001. (GC Exh. 43.) For example, on page 35, the personnel manual states:

> LABOR POLICY
>
> MJ Mechanical Services, Inc. is a merit (open-shop) contractor. The company has neither national nor local labor agreements with any building trade union(s). The company is not a union contractor and will defend its merit (open) shop status to the full extent of the law.
>
> The company believes it is in the best interest of the company and its employees to deal directly with each other through our open door policy without the intervention of a union or any other third party.

On page 74, the personnel manual excludes any employee covered by a collective-bargaining agreement from eligibility for the Respondent's pension plan. It states:

JOINING THE PLAN:

Who is Eligible to Participate in the Plan?

All current employees with at least 6 months of service and who are at least 21 years of age are eligible to participate in the plan.

The following employees are not eligible to participate in the plan:

* Employees covered by a collective bargaining agreement.

(GC Exh. 43.)

Neither of these provisions was included in the Respondent's prior personnel manual, which was implemented prior to the union organizing drive. (R. Exh. 1.) The denial of pension eligibility to any employee covered by a collective-bargaining agreement, in and of itself, is direct evidence of the Respondent's opposition to union organization.

Finally, general animus can be inferred from the unfair labor practices violations in *MJ Mechanical I* and *MJ Mechanical II*, which were upheld by the Board and affirmed by the DC Circuit Court of Appeals. There, like here, the primary issue was the Respondent's disparate implementation of its hiring policy at that time, which the Board and the Court found to be unlawful. There, like here, a secondary issue was the Respondent's refusal to distribute employment applications to job applicants based on their union affiliation, which was also found to be unlawful by the Board and the Court because it discouraged union applicants from applying for employment. Notably, in the midst of that litigation, the Respondent posted a sign in its front lobby in 1996 to discourage walk-in applicants, many of whom had turned out to be union salts in *MJ Mechanical I.* The sign remains in the Respondent's front lobby today.

Based on all of this evidence, I find that the General Counsel has satisfied its evidentiary burden. The Respondent must now show that it would have taken the same action, even in the absence of the Union.

c. *The Respondent's defense*

Quoting from *Ken Maddox Heating & Air Conditioning, Inc.,* 340 NLRB No. 7, slip op. at 3 (2003), the Respondent argues that "the bare fact that no union applicants were hired under the referral policy, without more, is not a ground for inferring that the Respondent's motives were unlawful." It asserts, and correctly so, that the Board has held that an employer legitimately may implement a hiring policy based on a hiring system that gives preference to former employees and employees referred by current employees.[35] See *CBI Na-Con, Inc.,* 343 NLRB No. 88 (2005).

A common element in the lawful referral hiring cases, however, which is not present here, is that the referral system relied on by the employer was in effect long before the union members sought employment with the company.[36] See *Ken Maddox Heating & Air*

[35] However, the Board also stated that the neutral hiring policy must be uniformly applied. *Id.*, slip op. at 1.

[36] In *CBI Na-Con, Inc.,* supra, there is no indication of how long the preferential hiring policy had existed or when the employer began using it.

Conditioning, supra (the employer's referral policy had been in existence for at least 4 years before the union members sought employment); *Brandt Construction Co.,* 336 NLRB 733, 740 (2001) (the employer faithfully adhered to its longstanding hiring policy that had been in effect since at least 1994 or 3 years before union members sought employment, and was posted on its employee bulletin boards prior to April 1997); *Kanawha Stone Co.,* 334 NLRB 235 (2001) (the employer had the same hiring policy in effect since its inception); and *Zurn/N.E.P.C.O.,* 329 NLRB 484, 488 (1999) (the employer had used a priority hiring system for several years, which it reduced to writing and placed in its policies and procedures manual a year before the union sought to "salt" three construction jobsites).

In an effort to show that this common element has been satisfied, the Respondent asserts that its written hiring policy is nothing more than a restatement of the hiring policy that has existed for several years. As briefly explained above, nothing could be further from the truth.

First, the Respondent's written hiring policy (GC Exh. 8) simply does not square with the hiring procedures outlined by the Respondent's President Michael Poole in his April 17, 1998 letter to the Union. (CP Exh. 2.) The letter does not mention categories of applicants or that certain applicants were given priorities over other categories. The letter does not state that applicants referred by employees were given a hiring preference. In contrast to the written hiring policy, the April 17 letter required applicants to "come to MJ's offices and complete an original MJ application blank." In other words, walk-in applicants were allowed and were given applications to complete. Indeed, accepting walk-in applications was consistent with the practice followed in *MJ Mechanical I,* where several union members walked-in, submitted applications on forms prepared by the Union, and were interviewed for employment.

Further, the policy of distributing and accepting walk-in applications continued at least through 1995, when sometime between May–November 1995, the Respondent's counsel instructed the office staff to stop giving out employment applications. As a result of that change, the Board in *MJ Mechanical I,* held that policy was unlawful and therefore the Respondent was ordered to cease and desist from refusing to distribute job applications to applicants because of the applicants' union affiliations. When the written hiring policy came out in 2000, however, it stated that employment applications for walk-in applicants would not be accepted, except during a prearranged scheduled interview, which is another change from the practice in the past.

Nor has the Respondent presented any credible evidence showing that it always had priority categories for selecting applicants. While the evidence shows that the Respondent had a preference for hiring applicants who were referred by employees, there is no evidence showing that in the past someone referred by a contractor association or a contractor associate was afforded the same deference. There is no evidence showing that applicants referred by temporary employment agencies were given a higher priority than walk-in or mail-in applicants. In fact, when the Respondent made a similar argument to Judge Amchan in *MJ Mechanical II,* he rejected it. In *MJ Mechanical II,* supra at 1105, Judge Amchan wrote:

> [The] Respondent contends that although it probably would have discriminated against the 23 Local 46 salts herein if it had the opportunity, it did not do so. It explains its decision to hire nonunion strangers to the company as a nondiscriminatory application of a company policy to hire such applicants only through a temporary services agencies. However, <u>there is no evidence that MJ had a policy of hiring nonreferrals only through a temporary services agency and not hiring individuals who applied for a job at its offices</u>–at least not until the salts started applying for jobs. Moreover, if it had such a policy and

> was acting without discriminatory motive, Respondent would have so informed the union applicants. (Emphasis added.)

Additional proof that the written hiring policy was not a restatement of existing policy is the fact that the August 15, 2000 written policy is not, and never has been, delineated in the Respondent's Personnel Policies, Practices and Procedures Manual.[37] The September 1993 version of the manual which was in effect one-year before the Union's initial organizing attempt, simply stated, "we encourage employees to recommend people for possible employment. Because our employees are so familiar with our company and its needs, we know your recommendations will often be on target." (R. Exh. 1.) There was no list of priority categories because they simply did not exist. The 2001 version of the personnel manual, that was issued six months after the Respondent internally promulgated its written hiring policy, did not contain or reference the written hiring policy. Instead, it merely reiterated the same statement that appeared in the early version. (See GC Exh. 43, p. 14.) It seems rather odd that the Respondent would not include a written restatement of its so-called "long standing" referral hiring policy in its revised personnel manual, unless for some reason it did not want anyone to know about it. Thus, the priority hiring policy here does not share the same common elements of the other referral hiring cases that have been found lawful by the Board.

The Respondent nevertheless argues that its written hiring policy was not implemented for unlawful reasons because there was no organizing going on and because the Respondent had no reason to believe that the Union had any interest in organizing its workers. In support of this position, the Respondent points out that between March 26, 1999 and August 15, 2000, the Union did not submit any resumes to the Respondent. The argument is unpersuasive for several reasons.

The undisputed evidence shows that the written hiring policy was conceived, developed, and implemented in the midst of a compliance specification litigation flowing from violations in two prior cases concerning the Respondent's unlawful hiring policy. In May 2000, the Respondent's President Michael Poole offered jobs to 23 discriminatees in the prior cases in order to cutoff their backpay. Thus, at least until that point there was a reasonable expectation that some or all of the discriminatees might accept employment with the Respondent and, therefore, the specter of a union organizing campaign was ever present, even though the Union applicants had not submitted any resumes for several months.

When none of the discriminatees accepted a job, the Respondent immediately began developing the written hiring policy. (Tr. 261.) At the same time, it disputed the General Counsel's compliance specifications which resulted in a hearing on June 20, 2000, in *MJ Mechanical III*. With backpay cutoff, the Respondent quietly implemented the August 15, 2000, written hiring policy. The evidence shows that in January 2001, Crist e-mailed Nowak inquiring about the Respondent's hiring procedures and the likelihood of obtaining a job. In February 2001, he and Hoffman went to the Respondent's offices, asked for employment applications, but were informed by the receptionist that she was not allowed to distribute employment applications. Thus, contrary to the impression that the Respondent seeks to foster, the Union did not abandon the notion of attempting to have its members work for the Respondent. I therefore reject the Respondent's assertion that the policy was not unlawfully implemented because there was no union activity at the time it was adopted.

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[37] In contrast, the hiring policy in *Zurn/N.E.P.C.O.,* supra, and other cases involving lawful referral hiring policies, were contained in the employers' personnel manual.

The Respondent further argues at page 20 of its posthearing brief that the reason it implemented the written hiring policy was to comply with the Board's decision in *MJ Mechanical II.* More specifically it asserts at page 22 that "Judge Amchan found that MJ discriminated because it could not point to a written policy and because not all hires were in accordance with its referral policy." The assertion is inaccurate and the argument is unconvincing.

First, Judge Amchan did not state that MJ discriminated because it could not point to a written policy. His decision does not even mention the words "written policy." In response to the respondent's argument that "its decision to hire nonunion strangers to the company [was] a nondiscriminatory application of a company policy to hire such applicants only through a temporary services agency," Judge Amchan found that there was no evidence that MJ had such a policy. *MJ Mechanical Services,* supra, 325 NLRB at 1105. [38]

Next, and in response to the respondent's argument that "[i]t only hired individuals, who were known to the company," Judge Amchan stated that "MJ's disregard of the union applications is not explained solely by its lack of personal contacts with the salts." Id*.* He found that MJ (1) on several occasions had demonstrated a willingness to ignore its normal hiring procedures; (2) had hired several nonunion strangers who had no contacts with MJ; and (3) had hired some nonunion strangers who came recommended by individuals that knew them only in a social context. In this connection, the Respondent asserts that the written hiring policy was developed to address these issues and ensure consistency.

The evidence shows, however, that the Respondent was no more consistent in implementing the written hiring policy than it was implementing its prior hiring policies. For example, several nonunion applicants were entered into the applicant log and interviewed, even though there is no resume for them in the record. The Respondent also kept the resume of Thomas Duffy and others on file for more than 30 days and called them for an interview later. At least four nonunion applicants were interviewed and offered jobs, even though there was no prerequisite employment requirement request for the positions that they were offered. Similar to *MJ Mechanical II,* several nonunion applicants here were interviewed even though they had no prior sheet metal/HVAC experience (i.e., John Flood/lawn care; Geoffrey Baumgartner/auto repair technician; James Brainard/landscaper; Matthew Cross/gas station attendant; Curtis Fisher and Daniel Kolb/Bon Ton department store workers; and Aaron Derkowitz/concrete pourer).

Equally unpersuasive is the Respondent's assertion that it is less than likely that Poole harbored animus toward the Union and that union affiliation had a bearing on the Respondent's decision to implement the written hiring policy because his father and grandfather belonged to a union. (Tr. 284.) This is the same Michael Poole, who in *MJ Mechanical I*, expressly required only union members to travel from Rochester to Buffalo, New York for an interview, where he proceeded to question them about their attitude toward the Union, which the Board found violated Section 8(a)(3) and (1) of the Act. *MJ Mechanical Services,* supra, 324 NLRB at 815.

Finally, the Respondent asserts that the General Counsel has failed to carry its evidentiary burden because it did not prove that the Union applicants were qualified. First, the issue is a nonissue because the General Counsel is not required to show that the Union applicants were qualified as part of its failure to consider case. See *Wayne Erecting, Inc.,* 333 NLRB 1212 (2001). Next, the Respondent does not argue that the Union applicants were not

[38] Nor did the Board's decision state that the respondent's conduct was unlawful because it did not have a written policy.

considered because they were not qualified. (Tr. 369-370.) Finally, Union Representatives Crist and DeCarlo testified that they were personally familiar with the work experience of most of the Union applicants because they had worked and/or trained several of the journeymen and apprentice Union members. In contrast, many of the nonunion applicants who were interviewed and hired had absolutely no sheet metal/HVAC experience.

For all of these reasons, I find based on the evidence viewed as a whole that the Respondent failed to show that it uniformly applied its written hiring policy and that it would not have considered the Union applicants for hire, even in the absence of their union affiliation.

Accordingly, I find that the Respondent has unlawfully maintained its August 15, 2000, written hiring policy and unlawfully failed to consider for hire union applicants in violation of Section 8(a)(3) and (1) of the Act.

3. The inherently destructive argument

Both the General Counsel and the Charging Party Union argue in their posthearing briefs that the written hiring policy is inherently discriminatory and destructive of Union applicants' Section 7 rights. *NLRB v. Great Dane Trailers,* 338 U.S. 26, 34 (1967). The Respondent does not address the issue in its posthearing brief. There is no allegation in the amended complaint that the written hiring policy was inherently destructive of Section 7 rights. It was not asserted in the opening statements by the General Counsel or the Charging Party Union (Tr. 28-35, 35-43) or litigated as part of their cases-in-chief. Under these circumstances, it would be inappropriate to make an unfair labor practice finding on an issue that was not fully and fairly litigated. *Ken Maddox Heating & Air Conditioning,* 340 NLRB No. 7, slip op. at 2 (2003). Accordingly, I find it unnecessary to consider and address this posthearing brief argument.

4. Refusal to distribute employment applications

Paragraph VI (b) of the amended complaint alleges that since on or about August 15, 2000, the Respondent has refused to distribute employment applications to job applicants in order to exclude from consideration for employment job applicants on the basis of their union affiliation.

The undisputed evidence shows that beginning in February 2001, and on other occasions through June 2002, Union Organizer Paul Crist, as well as other Union officials and Union members wearing Union paraphernalia visited the Respondent's offices, introduced themselves as Union representatives, asked for employment applications, and were told by the receptionist that she was not allowed to give out applications. (Tr. 309-311, 399-402, 417-421.) Poole testified that the Respondent has refused to distribute or provide copies of job applications to applicants because "[w]e're following the policy." (Tr. 267.)

The General Counsel asserts that "every time Union applicants, wearing Union insignia or identifying themselves as Union members, attempted to obtain employment applications from Respondent's receptionist they were denied . . . [however] category 2 applicants always got employment applications, as did some Category 4 hires who responded to advertisements, in spite of the 'no applications' sign."

There is no evidence showing that the Respondent gave employment applications to nonunion applicants, who visited the Respondent's offices seeking a job, but would not give one to Union officials or members. The evidence does show, however, that pursuant to its unlawfully

implemented written hiring policy, the Respondent gave employment applications only to the nonunion applicants contacted by Pohlman for an interview.

Because the Respondent acted pursuant to an unlawfully implemented policy, I find that it violated Section 8(a)(3) and (1) by failing and refusing to distribute employment applications to Union applicants, who visited its offices.

5. The unlawful refusal to accept resumes by mail

Paragraph VI (c) of the amended complaint alleges that since on or about May 2002, the Respondent has refused to accept resumes and/or employment applications by mail.

The undisputed evidence shows that since January 24, 2001, EC James Pohlman has received, accepted, and recorded in the applicant log dozens of resumes from nonunion applicants. (GC Exh. 10.) The undisputed evidence further shows that on May 23, 2002, Union Organizer Paul Crist mailed 37 Union applicant resumes to the Respondent as he had done several times in the past. By letter, dated May 30, 2002, Pohlman returned all of these Union applicant resumes to Crist stating that "it is our company policy to accept only original applications. Unsolicited applications/resumes are not accepted by mail."[39] (GC Exh. 24.) In January 2003, after the Union filed the underlying charge for this allegation, the Respondent began accepting mail-in resumes from Union applicants.

The Respondent does not dispute the content of the letter or that the resumes were returned to the Union. Instead, it asserts that it did not accept any mail resumes between May 30 and December 2002. The assertion is dubious. The fact that there are no "mail-in" resumes reflected in the applicant flow log between May 30–December 10, 2002 could be attributed to the fact that no one mailed in a resume during those months. Significantly, the Respondent has not shown that it refused to accept and/or mailed back anyone else's resume nor has shown that any other applicant who mailed in a resume in this period received the same letter.

I find that the evidence viewed as a whole supports a reasonable inference that Respondent rejected the Union applicant resumes and returned them with the May 30 letter in order to discourage Union applicants from applying for employment.

Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing and returning the Union applicant resumes on May 30, 2002.

6. Pohlman's alleged supervisory status

The amended complaint alleges, and the General Counsel argues, that James Pohlman is a supervisor within the meaning of Section 2(11) of the Act. The undisputed evidence shows that Pohlman does not have the authority to discipline, suspend, transfer, layoff, fire, recall, promote, or grant wage increases or benefits. (Tr. 218-221.) There is no evidence that he has ever hired anyone. The General Counsel nevertheless argues that Pohlman is an integral part of the hiring process because he determines which category to assign an applicant and he does the initial interviews which ultimately lead to hiring. The General Counsel asserts that Pohlman effectively recommends employees for hiring, even though he does not hire them himself.

[39] The undisputed evidence shows that shortly after Pohlman returned the union applicant resumes, the Respondent interviewed and offered employment to several nonunion applicants. (GC Exh. 10 at 19.)

The General Counsel does not cite any cases in support of his theory. The argument ignores the unrebutted evidence that Pohlman reviews the applicant's resume with the department head, who tells Pohlman whether he wants to interview the applicant. It also ignores the unrebutted evidence that in the initial interview, Pohlman only confirms the information on the resume and that the department head then conducts his own interview afterwards. I find that the evidence viewed as a whole shows that Pohlman's role is more like that of a human resources representative, who screens applicants at the beginning of the hiring process, but does not actually hire the individual. Moreover, and contrary to the General Counsel's assertions, the evidence does not show that Pohlman recommends to the department head who should be hired.

Accordingly, I find that the General Counsel has not satisfied its evidentiary burden of showing that James Pohlman is a supervisor within the meaning Section 2(11) of the Act.

7. Christine Nowak's agent status

At trial, the General Counsel further amended the amended complaint to allege that the Respondent's employee, Christine Nowak, is an agent within the meaning of Section 2(13) of the Act. Nowak is responsible for the marketing of self-service contracts for commercial/industrial air conditioning and heating customers. (Tr. 255.) The evidence shows that in January 2001, Union Organizer Crist visited the Respondent's webpage, which listed Nowak as a contact person. Over the next few weeks and again in February 2002, Nowak and Crist exchanged approximately six e-mails in which Crist advised Nowak that he was interested in seeking employment with the Respondent and Nowak advised him that although the Respondent was not currently accepting applications, that she would be happy to review his resume, and that if he submitted a resume and letter of intent she would forward it to the appropriate department head. (Tr. 305; GC Exh.15.) In essence, Nowak was holding herself out as "conduit" for the transmission of employment information to and from the Respondent. Whether she was actually authorized to do so is inconsequential. The test is whether under the circumstances, a third party would reasonably believe that the alleged agent was acting on behalf of the employer when she took the action in question. *Quality Mechanical Insulation, Inc.,* 340 NLRB No. 91, slip op. at 5 (2003).

Under these circumstances, I find that Crist had a reasonable basis for believing that the Respondent authorized Nowak to act for it, particularly since her e-mails stated (1) that if Crist sent in a resume she would forward it to the manager of the division; (2) solicited him to "please forward your resume and a letter of intent and I will get it to the appropriate department;" and (3) told him to mail a resume to Pohlman. (GC Exh. 15.) In the February 2002 e-mail, she told Crist that she had "forwarded your transmission on to a few (people)."

Accordingly, I find that Nowak was an agent of the Respondent within the meaning of Section 2(13) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) Implementing and maintaining a written hiring policy in order to exclude from consideration for employment job applicants on the basis of their union affiliation.

(b) Failing and refusing to consider for hire the following Union applicants:

Asarese, Philip J.	Livergood, Terry
Benner, Timothy J.	Long, Mark
Breslin, Dean D.	Mach, Jeff
Blasz, Joe	Manwaring, Amica
Brantell, Michael	Martin, Douglas
Breslin, Dean D.	Meyer, Jeffrey
Burns Jr., Ronald	Nidell, Bruce A.
Carlevarini, Joseph M.	Nuwer, Aaron
Crist, Paul	Pfarner, Larry, Jr
Cultrara, David J.	Piotrowski Jr., Joseph
DeCarlo, Joseph	Przybyla, Derek
Denner, Dave	Purucker, Richard
Dippold, Robert	Reisdorf, John
Everett, Richard L.	Rittein, Robert
Flattery, Walter	Ruchser, Thomas
Fontana, William	Sass, David
Galla, Brian P.	Schmidt, Kurt
Gietler, Harry	Schwartz, James
Goodenough, Bruce	Scibetta, Michael
Hamm, Gerry	Smith, Guy P
Hein, Robert	Snuszki, Scott
Hoffhines, Richard	Somogye, Tom
Hoffman, Edward G.	Stevenson, Wayne
Howard, Ian	Unger, Raymond
Hughes, Kevin	Warner, Reginald E.
Hunt, Jason	Wizner, Darren
Kress, Steven	Zorn, Jason
Korsh, Roger T.	Zybert, Tony
Lengen, Bob	

(c) Refusing to distribute employment applications to job applicants in order to exclude them from employment consideration because of their union affiliation.

(d) Refusing to accept resumes by mail from applicants because of their union affiliation.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent failed and refused to consider for employment the above-referenced discriminatees in violation of Section 8(a)(3) and (1) of the Act, it must notify them in writing than any future job application will be considered in a nondiscriminatory way and notify each discriminatee, the Charging Party Union, and the Regional Director of future openings in airside, balancing, controls, installation, service, sheet metal/shop and residential positions or substantially equivalent positions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, M.J. Mechanical Services, Inc. and M.J. Mechanical Services, Inc. d/b/a Vastola Heating & Air Conditioning, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing and maintaining a written hiring policy in order to exclude from consideration for employment job applicants on the basis of their union affiliation.

(b) Failing and refusing to consider for hire the following Union applicants:

Asarese, Philip J.	Livergood, Terry
Benner, Timothy J.	Long, Mark
Breslin, Dean D.	Mach, Jeff
Blasz, Joe	Manwaring, Amica
Brantell, Michael	Martin, Douglas
Breslin, Dean D.	Meyer, Jeffrey
Burns Jr., Ronald	Nidell, Bruce A.
Carlevarini, Joseph M.	Nuwer, Aaron
Crist, Paul	Pfarner, Larry, Jr
Cultrara, David J.	Piotrowski Jr., Joseph
DeCarlo, Joseph	Przybyla, Derek
Denner, Dave	Purucker, Richard
Dippold, Robert	Reisdorf, John
Everett, Richard L.	Rittein, Robert
Flattery, Walter	Ruchser, Thomas
Fontana, William	Sass, David
Galla, Brian P.	Schmidt, Kurt
Gietler, Harry	Schwartz, James
Goodenough, Bruce	Scibetta, Michael
Hamm, Gerry	Smith, Guy P
Hein, Robert	Snuszki, Scott
Hoffhines, Richard	Somogye, Tom
Hoffman, Edward G.	Stevenson, Wayne
Howard, Ian	Unger, Raymond

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Hughes, Kevin	Warner, Reginald E.
Hunt, Jason	Wizner, Darren
Kress, Steven	Zorn, Jason
Korsh, Roger T.	Zybert, Tony
Lengen, Bob	

(c) Refusing to distribute employment applications to job applicants in order to exclude them from employment consideration because of their union affiliation.

(d) Refusing to accept resumes by mail because of their union affiliation.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify in writing, the above-named discriminatees that any future job application will be considered in a nondiscriminatory way and notify each discriminatee, the Charging Party Union, and the Regional Director of future openings in airside, balancing, controls, installation, service, sheet metal/shop and residential positions or substantially equivalent positions.

(b) Within 14 days after service by the Region, post at its facility in Tonawanda, New York, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 3, 2005

C. Richard Miserendino
Associate Chief
Administrative Law Judge

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT implement and maintain a written hiring policy in order to exclude from consideration for employment job applicants on the basis of their union affiliation.

WE WILL NOT fail and refuse to consider for hire the job applicants on the basis of their union affiliation.

WE WILL NOT refuse to distribute employment applications to job applicants in order to exclude them from employment consideration because of their union affiliation.

WE WILL NOT refuse to accept resumes by mail from applicants because of their union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, notify in writing, the following union member applicants that any future job resume that they submit will be considered in a nondiscriminatory way and notify each discriminatee, the Charging Party Union, and the Regional Director of future openings in airside, balancing, controls, installation, service, sheet metal/shop and residential positions or substantially equivalent positions:

Asarese, Philip J. Livergood, Terry
Benner, Timothy J. Long, Mark
Breslin, Dean D. Mach, Jeff
Blasz, Joe Manwaring, Amica
Brantell, Michael Martin,

Douglas

Breslin, Dean D. Meyer, Jeffrey
Burns Jr., Ronald Nidell, Bruce

A.

Carlevarini, Joseph M. Nuwer,

Aaron

Crist, Paul Pfarner, Larry, Jr

Cultrara, David J. Piotrowski Jr., Joseph
DeCarlo, Joseph Przybyla, Derek
Denner, Dave Purucker, Richard
Dippold, Robert Reisdorf, John
Everett, Richard L. Rittein, Robert
Flattery, Walter Ruchser, Thomas
Fontana, William Sass, David
Galla, Brian P. Schmidt, Kurt
Gietler, Harry Schwartz, James
Goodenough, Bruce Scibetta, Michael
Hamm, Gerry Smith, Guy P
Hein, Robert Snuszki, Scott
Hoffhines, Richard Somogye, Tom
Hoffman, Edward G. Stevenson, Wayne
Howard, Ian Unger, Raymond
Hughes, Kevin Warner, Reginald E.
Hunt, Jason Wizner, Darren
Kress, Steven Zorn, Jason
Korsh, Roger T. Zybert, Tony
Lengen, Bob

M.J. MECHANICAL SERVICES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS

NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.